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YEARBOOK

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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-sixth 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-eighth session, which was held in Vienna, from 29 June-16 July 2015, 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-eighth 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-eighth 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:

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
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
XLI	2010	A/CN.9/SER.A/2010
XLII	2011	A/CN.9/SER.A/2011
XLIII	2012	A/CN.9/SER.A/2012
XLIV	2013	A/CN.9/SER.A/2013
XLV	2014	A/CN.9/SER.A/2014

Part One

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

THE FORTY-EIGHTH SESSION (2015)

A. Report of the United Nations Commission on International Trade Law, forty-eighth session (Vienna, 29 June-16 July 2015) (A/70/17)

[Original: English]

Contents

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-eighth session of the Commission, held in Vienna from 29 June to 16 July 2015.

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-eighth session of the Commission was opened on 29 June 2015.

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 3 November 2009, on 15 April 2010, on 14 November 2012 and on 14 December 2012 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 (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Colombia (2016), Côte d'Ivoire (2019), Croatia (2016), Czech Republic (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019), Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Poland (2016), Republic of Korea (2019), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016), Turkey (2016), Uganda (2016), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019).

5. With the exception of Armenia, Botswana, Cameroon, Côte d'Ivoire, Fiji, Gabon, Jordan, Kuwait, Liberia, Mauritania, Mauritius, Namibia, Nigeria, Paraguay, Sierra Leone and Zambia, all the members of the Commission were represented at the session.

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[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, 28 were elected by the Assembly at its sixty-fourth session, on 3 November 2009, two were elected by the Assembly at its sixty-fourth session, on 15 April 2010, 29 were elected by the Assembly at its sixty-seventh session, on 14 November 2012, and one was elected by the Assembly at its sixty-seventh session, on 14 December 2012. 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).

6. The session was attended by observers from the following States: Angola, Belgium, Benin, Bolivia (Plurinational State of), Chile, Costa Rica, Cyprus, Dominican Republic, Egypt, Finland, Lebanon, Luxembourg, Mali, Netherlands, Norway, Oman, Peru, Portugal, Qatar, Romania, Slovakia, Sri Lanka, Tunisia, United Arab Emirates and Viet Nam.

7. The session was also attended by observers from the European Union.

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

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID), United Nations Conference on Trade and Development (UNCTAD) and World Bank;

(b) *Intergovernmental organizations*: Energy Charter Secretariat, the Hague Conference on Private International Law, International Institute for the Unification of Private Law (Unidroit), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Bar Association (ABA), American Society of International Law, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), EU Federation for the Factoring and Commercial Finance (EUF), European Law Institute (ELI), European Law Students' Association, Factors Chain International (FCI), Fondation pour le droit continental, Forum for International Conciliation and Arbitration (FICACIC), German Institution of Arbitration (DIS), International Association of Democratic Lawyers (IADL), International Bar Association (IBA), International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCC), International Council for Commercial Arbitration (ICCA), International Factors Group (IFG), International Federation of Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Law Institute (ILI), International Mediation Institute (IMI), International Swaps and Derivatives Association (ISDA), Internet Corporation for Assigned Names and Numbers (ICANN), Korean Commercial Arbitration Board (KCAB), Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT), Swiss Arbitration Association (ASA) and Vienna International Arbitral Centre (VIAC).

9. 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

10. The Commission elected the following officers:

Chair:	Mr. Francisco REYES VILLAMIZAR (Colombia)
Vice-Chairs:	Mr. Yongil LEE (Republic of Korea) Mr. Michael Adipo Okoth OYUGI (Kenya) Mr. Michael SCHNEIDER (Switzerland)
Rapporteur:	Mr. Siniša PETROVIC (Croatia)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 998th meeting, on 29 June, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of issues in the area of arbitration and conciliation:
   (a) Consideration and provisional approval of draft revised UNCITRAL Notes on Organizing Arbitral Proceedings;
   (b) Enforcement of settlement agreements resulting from international commercial conciliation/mediation;
   (c) Possible future work in the area of arbitration and conciliation;
   (d) Establishment and functioning of the transparency repository;
   (e) International commercial arbitration moot competitions.
5. Consideration of issues in the area of security interests:
   (a) Consideration and provisional approval of parts of a model law on secured transactions;
   (b) Possible future work in the area of security interests;
   (c) Coordination and cooperation in the area of security interests.
6. Micro-, small- and medium-sized enterprises: progress report of Working Group I.
7. Online dispute resolution: progress report of Working Group III.
8. Electronic commerce: progress report of Working Group IV.
9. Insolvency law: progress report of Working Group V.
10. Endorsement of texts of other organizations: Principles on Choice of Law in International Commercial Contracts.
11. Technical assistance to law reform.
12. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts:
   (a) Case law on UNCITRAL texts (CLOUT);
   (b) Digests of case law relating to UNCITRAL legal texts.
13. Status and promotion of UNCITRAL legal texts.
14. Coordination and cooperation:
   (a) General;
   (b) Reports of other international organizations;
   (c) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups.
15. UNCITRAL regional presence.
16. Role of UNCITRAL in promoting the rule of law at the national and international levels.
17. The thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).
18. Work programme of the Commission.

19. Relevant General Assembly resolutions.

20. Other business.

21. Date and place of future meetings.

22. Adoption of the report of the Commission.

E. Establishment of a Committee of the Whole

12. The Commission established a Committee of the Whole and referred to it for consideration under agenda item 5 (a). The Commission elected Mr. Rodrigo LABARDINI FLORES (Mexico) to chair the Committee of the Whole in his personal capacity. The Committee of the Whole met from 13 to 16 July and held 7 meetings. At its 1023rd meeting, on 16 July, the Commission considered and adopted the report of the Committee of the Whole and agreed to include it in the present report (see para. 214 below). (The report of the Committee of the Whole is reproduced in paras. 169-213 below).

F. Adoption of the report

13. The Commission adopted the present report by consensus at its 1006th and 1007th meetings on 3 July, 1014th and 1015th meetings on 10 July, 1016th meeting on 13 July and 1023rd meeting on 16 July 2015.

III. Consideration of issues in the area of arbitration and conciliation

A. Consideration and provisional approval of draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

1. Introduction

14. The Commission recalled its decision at the forty-sixth session, in 2013, that Working Group II (Arbitration and Conciliation) should undertake work on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings[2] (referred to as the "Notes").[3] At that session, it was agreed that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of the Notes would be preserved.[4] The Commission further recalled that, at its forty-seventh session, in 2014, it agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second session, the revision of the Notes. In so doing the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[5]

15. At its current session, the Commission had before it the reports of Working Group II on the work of its sixty-first session, held in Vienna from 15 to 19 September 2014, and its sixty-second session, held in New York from 2 to 6 February 2015 (A/CN.9/826 and A/CN.9/832, respectively). It also had before it the text of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (the "draft revised Notes") as contained in document A/CN.9/844.

16. The Commission took note of the summary of the deliberations on the draft revised Notes that had taken place at the sixty-first and sixty-second sessions of the Working Group. The Commission considered the draft revised Notes, with the aim of their provisional approval at its current session, and adoption at its next session, in

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[2] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

[3] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[4] Ibid.

[5] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

2016. In so doing the Commission agreed to address substantive matters in relation to the revision of the Notes, entrusting the Secretariat with any consequential drafting modifications.

2. Consideration of the draft revised Notes

(a) General remarks

17. The Commission recalled that, when it finalized the Notes at its twenty-ninth session, in 1996, it approved the principles underlying the Notes, among which were: that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices and, in the face of such disparate practices, to recommend the use of any particular procedure.[6] It was furthermore recalled that one of the great advantages of the Notes was their descriptive and non-directive nature that reflected a variety of practices.

18. The Commission agreed that the draft revised Notes should retain those characteristics and that their purpose should not be to promote any practice as best practice.

19. Further, the Commission confirmed the understanding of the Working Group that the draft revised Notes should maintain their general applicability and address procedural issues that might arise, without differentiating the types of arbitration. In that context, the Commission noted that draft Note 6 addressing "information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration" highlighted a specific issue that might arise in relation to investment arbitration, while still preserving the general nature of the draft revised Notes.

20. The Commission also confirmed the understanding of the Working Group that references to technology and means of communication in the draft revised Notes needed to be updated using language that would not be technology-specific (A/CN.9/826, paras. 25, 38, 39, 91 to 102, 110 and 125). It was also noted that new topics had been covered under the draft revised Notes in relation to interim measures, joinder and consolidation.

21. As a matter of drafting, the Commission agreed that terms should be used in a consistent manner in the next version of the draft revised Notes. For instance, it was said that the term "document" which was used in a general manner sometimes referred specifically to "documentary evidence", sometimes to "written submissions", and sometimes to "copies of legal authorities" and that these distinct meanings should be clarified in the relevant paragraphs of the draft revised Notes, whose scope would otherwise be unclear. Furthermore, it should be clarified whether the term "witnesses" referred to witnesses of facts, expert witnesses or both.

(b) Comments on paragraphs of the draft revised Notes

Introduction (paras. 1 to 16)

Paragraph 13 of the draft revised Notes

22. The Commission approved the suggestion that the word "usually" should be added before the word "desirable" in the last sentence of paragraph 13 to reflect the exceptional circumstance in which the participation of the parties themselves would not be desirable.

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[6] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), para. 13.

Paragraph 14 of the draft revised Notes

23. It was said that paragraph 14 clarified an important procedural matter in relation to the situation where a party did not participate in procedural meetings. It was suggested that the arbitral tribunal, even under such circumstances, should always provide the parties with an opportunity to present their case. Therefore, the Commission agreed to delete the words "possibly in the procedural timetable" from that paragraph, and to add a separate sentence reflecting the fact that if a procedural timetable was established, that timetable should be adjusted to provide for such opportunity.

24. A suggestion was made to reflect the need to adjust the procedural timetable in situations of joinder and consolidation. That suggestion did not receive support as joinder and consolidation usually did not occur after the constitution of the arbitral tribunal and as that matter was adequately addressed in paragraphs 12 and 14 of the draft revised Notes.

Paragraph 15 of the draft revised Notes

25. The Commission agreed to add the word "also" before the words "be made orally" in the second sentence of paragraph 15 to better reflect the various forms decisions made at procedural meetings might take.

26. In order to reflect practice, it was agreed that a sentence along the following lines could be added to paragraph 15: "For instance, it is common for an arbitral tribunal to summarize the decisions taken at the first procedural meeting in a procedural order setting forth the rules governing the arbitration." The Commission further agreed that where the draft revised Notes referred to matters to be considered at the outset of the proceedings, a cross-reference to paragraph 15 should be added.

Annotations

Note 1 — Set of arbitration rules (paras. 17 to 19)

Paragraph 17 of the draft revised Notes

27. A suggestion was made that the fourth sentence of paragraph 17 should be revised to provide that the set of arbitration rules chosen by the parties would govern the arbitration "subject to the mandatory provisions of the applicable arbitration law", instead of focusing on the prevalence of the set of arbitration rules over non-mandatory provisions of that law.

28. In response, it was noted that the general principle of the agreement of the parties being subject to the mandatory provisions of the applicable arbitration law was already stated in paragraphs 5 and 6 of the draft revised Notes, and that the purpose of the fourth sentence of paragraph 17 was to highlight that party autonomy prevailed over any non-mandatory provisions of the applicable arbitration law, a principle also reflected in article 1, paragraph 1, of the UNCITRAL Arbitration Rules (as revised in 2010).[7]

29. After discussion, the Commission agreed to retain the fourth sentence of paragraph 17 without modification and to replace the words "may be better adapted to a particular case" in the last sentence of that paragraph by words along the following lines: "may better reflect the objectives of the parties".

Paragraph 18 of the draft revised Notes

30. It was noted that paragraph 17 dealt with circumstances where there existed an agreement on a set of arbitration rules prior to the commencement of the arbitration and that no reference was made to the form of that agreement. It was stated that, in contrast, the first sentence of paragraph 18 referred to stipulation in the form of an "arbitration agreement", which was too specific. It was suggested that paragraph 18

[7] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

should apply generally to situations where the parties had not agreed on a set of arbitration rules.

31. With respect to the second sentence of paragraph 18, a question was raised whether that provision was intended to also address situations where parties would agree on an arbitral institution to administer a case under a set of arbitration rules other than the rules of that institution. It was suggested that if that were to be the case, the words "ad hoc" should be deleted as those words could be misunderstood to limit such possibility.

32. It was generally agreed that the objective of paragraph 18 was to indicate that the parties would need to secure the agreement of the arbitral institution, in particular if the arbitral tribunal was already constituted. It was recalled that at the sixty-first session of the Working Group, concerns were expressed with respect to including in the draft revised Notes the practice of using institutional rules without the arbitration being administered by that institution, as such practice often led to confusion, delays and costs (A/CN.9/826, para. 45). Therefore, it was agreed that the draft revised Notes would not need to elaborate further on such possibility. It was further suggested that the words "regardless whether the arbitration is administered under the arbitration rules of that institution or under the UNCITRAL Arbitration Rules, or any other ad hoc rules" could be deleted as they were redundant.

33. As a matter of clarification, it was agreed that the second sentence of paragraph 18 should be revised along the following lines: "If the parties agree after the arbitral tribunal has been constituted that an arbitration institution will administer the dispute, it may (…)".

Paragraph 19 of the draft revised Notes

34. The Commission agreed that paragraph 19 should be revised to indicate that the arbitral tribunal, in determining how the proceedings would be conducted, might refer to a set of arbitration rules.

Note 2 — Language or languages of the arbitral proceedings (paras. 20 to 25)

Paragraph 20 of the draft revised Notes

35. In relation to the second sentence of paragraph 20, the Commission agreed that reference should be made to the parties having the capacity or being at ease to understand or communicate in, rather than being "familiar" with, the language of the proceedings.

Paragraph 22 of the draft revised Notes

36. It was suggested that paragraph 22 should clarify the possibility of translating only part of relevant documents, including in the case of voluminous judicial decisions and juridical writings (legal authorities).

37. In that context, it was agreed that the draft revised Notes should address issues related to legal authorities in a general manner (for example, indicating that submission of case law might not be necessary where the arbitrators were familiar with it).

Note 3 — Place of arbitration (paras. 26 to 30)

Paragraph 27 of the draft revised Notes

38. The Commission agreed to broaden the list of legal consequences of the choice of the place of arbitration, to include matters such as the impact on the appointment of arbitrators, requirements in relation to the signing of the awards. More generally, it was agreed to provide that arbitrators and parties should make themselves acquainted with the arbitration law at the place of arbitration.

39. A suggestion that the draft revised Notes should contain a general reference to the law applicable to the merits of the case did not receive support, as it was

considered that that question was outside the scope of the draft revised Notes, which focused on procedural aspects.

Paragraphs 28 and 29 of the draft revised Notes

40. The Commission approved the suggestion that the qualification restrictions with respect to counsel representation referred to in paragraph 29 (iv) could also constitute a relevant criteria under paragraph 28, as that matter might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award. Along the same lines, it was suggested that applicable arbitration law might include restrictions on the qualification of arbitrators, and that that question might also deserve consideration under paragraphs 28 and 29. It was stated, however, that the law governing the place of arbitration did not apply with respect to the qualification of the arbitrators in international arbitration.

Paragraph 30 of the draft revised Notes

41. In relation to paragraph 30, it was suggested that parties and the arbitral tribunal should consider that holding all hearings outside of the place of arbitration might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award in certain jurisdictions.

42. The Commission confirmed the understanding that the words "expeditious and convenient" in paragraph 30 were broad enough to cover situations where, for reasons of force majeure, hearings could not be held at the place of arbitration.

Note 4 — Administrative support that may be needed for the arbitral tribunal to carry out its functions (paras. 31 to 37)

Paragraph 33 of the draft revised Notes

43. It was agreed that the first sentence of paragraph 33 should read along the following lines: "Unless the administrative arrangements for the proceedings are made by an arbitral institution, they will usually be made by the parties or the arbitral tribunal". It was explained that such support or services might not necessarily be available from all arbitration institutions.

Paragraph 35 of the draft revised Notes

44. In relation to the last sentence of paragraph 35 which provided that "In any event, secretaries would normally not be involved in the arbitral tribunal's decision-making functions", a wide range of views were expressed.

45. One view was that the present text correctly reflected the current practice where the arbitral tribunal would normally be making decisions while, in certain rare instances, secretaries could be tasked with providing legal advice. Reference was made to rules and practices in relation to certain types of arbitration, like commodity arbitration, or arbitration in specific sectors, where a secretary to the arbitral tribunal might be the only person with legal background tasked with functions that might have an impact on the decision-making process. Therefore, it was suggested that the present text should be retained, possibly with additional clarifications.

46. Another view was that the word "normally" could be misleading as it was generally understood that a secretary should not be involved in the decision-making process. Accordingly, the suggestion was made that the original wording used in paragraph 27 of the Notes would be more appropriate, which read: "However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal."

47. Recalling the non-prescriptive nature of the draft revised Notes, another suggestion was to state the principle that the arbitral tribunal was tasked with the decision-making function, without any reference to secretaries. In that context, yet another suggestion was that if that general principle were to be stated, the revised

draft Notes should make it clear that the secretaries in certain types of arbitration would not be prevented from providing legal advice to the arbitral tribunal.

48. After discussion, the Commission decided to consider the issue further at a later stage of its deliberations.

Note 5 — Cost of arbitration (paras. 38 to 47)

Paragraphs 38 to 40 of the draft revised Notes

49. In relation to paragraph 38, it was highlighted that the determination of the arbitral tribunal with respect to the cost of arbitration would in some cases be restricted (for example, when the fees and expenses of the arbitral tribunal were set by the arbitration institution). Moreover, it was stated that the arbitral tribunal would have no control over the legal costs incurred by the parties. It was further stated that in any case, determination of cost by the arbitral tribunal would be limited to recoverable costs. A number of suggestions were made that the draft revised Notes should emphasize and elaborate further on the meaning of "reasonableness" not only with respect to cost and fees of the arbitral tribunal, but also with respect to whether a party was entitled to compensation for all or some of its cost. It was also stated that the arbitral tribunal should set out the standards of reasonableness with respect to cost and its allocation at the outset of the proceedings.

50. After discussion, it was agreed that paragraphs 38 to 40 should be recast to clearly set out the elements or items of cost of arbitration and then state that it would be the arbitral tribunal's responsibility to ensure the reasonableness of such cost, regarding both the fees and expenses of the arbitrators and allocation of recoverable cost.

Paragraph 41 of the draft revised Notes

51. It was agreed that the order of the first two sentences of paragraph 41 should be reversed to first provide that parties would normally be requested to deposit an amount to cover costs, and then address instances where such deposit would not be handled by an arbitral institution and thus would need to be taken care of by the arbitral tribunal.

Paragraphs 45 and 46 of the draft revised Notes

52. The Commission heard various proposals in relation to paragraphs 45 and 46. It was suggested that the emphasis should be on the discretionary power of the arbitral tribunal to decide on cost allocation. It was further said that the legal basis for an arbitral tribunal to make a decision on cost allocation should be reflected in those paragraphs by including references to the applicable arbitration law, arbitration rules and agreement of the parties. It was further underlined that there were various practices in relation to methods for allocating costs.

53. After discussion, the Commission agreed that it would be useful to provide more information to arbitral tribunals in relation to cost allocation and that reference should be made to the widely applied principle of "cost follow the event". It was also agreed that paragraph 46 should be redrafted along the following lines: "The arbitral tribunal may also wish to consider the conduct of the parties in applying any allocation method agreed by the parties or specified by the applicable arbitration law or arbitration rules, or in the absence of such agreement or specification, in applying such other method as the arbitral tribunal deems appropriate. Conduct so considered might include a failure to comply with procedural orders or abusive procedural requests (for example, document requests, procedural applications and cross-examination requests) to the extent that they actually had a direct impact on the cost of arbitration and are determined by the arbitral tribunal to have unnecessarily delayed or obstructed the proceedings." It was underlined that that proposal made clear that certain conducts by parties (for example, requests that resulted in delay or disruption of the process, or requests that were abusive or unjustified) could have an impact on cost allocation and

that in order to hold the relevant party responsible, the arbitral tribunal would have to find that the requests were unreasonable.

Paragraph 47 of the draft revised Notes

54. It was generally agreed that decisions by the arbitral tribunal on cost and its allocation could be made at any time during the proceedings and not necessarily with the final award on the merits. Therefore, it was agreed to include the word "necessarily" between the words "not" and "need" in the first sentence of paragraph 47. It was further agreed that the draft revised Notes should illustrate the possibility of decisions on the cost and its allocation being made subsequent to the final award.

55. In response to a suggestion that the "final" award referred to in the first sentence of paragraph 47 might not necessarily be on the merits (for example, if the proceedings terminated with an award on jurisdiction), it was agreed that words "on the merits" should be deleted.

56. While a suggestion was made that the draft revised Notes should address the question of security for costs, it was considered not to be necessary.

Note 6 — Information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration (paras. 48 to 53)

Paragraph 49 of the draft revised Notes

57. A suggestion was made to include in paragraph 49 a reference to the applicable arbitration law in order to draw attention of the parties to the existing legislative framework on confidentiality. It was further pointed out that while there might be provisions on confidentiality in the applicable arbitration law or arbitration rules, the parties should be made aware that such provisions might not be mandatory or sufficiently address the concerns of the parties.

58. After discussion, the Commission agreed to revise paragraph 49 along the following lines: "Should confidentiality be a concern or priority and should the parties not be satisfied by the treatment of that issue in the non-mandatory provisions of the applicable arbitration law or derogable provisions of the arbitration rules, the parties may wish to provide for confidentiality in the form of an agreement".

Paragraphs 51 and 52 of the draft revised Notes

59. A suggestion was made that paragraphs 51 and 52 should be elaborated to illustrate instances where parties from different jurisdictions might be subject to different obligations in relation to confidentiality or disclosure under the law applicable to them or to their counsel in their respective jurisdiction. It was noted that paragraph 51 already addressed that question in general terms. The Commission agreed to consider at a later stage whether a more detailed provision on the issue would be required.

Paragraph 53 of the draft revised Notes

60. It was noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-States Arbitration[8] ("UNCITRAL Transparency Rules") could also apply by agreement of the disputing parties under article 1(2)(a) of the UNCITRAL Transparency Rules, and paragraph 53 should be revised taking that into account.

Note 7 — Means of communication (paras. 54 to 57)

Paragraph 54 to 57 of the draft revised Notes

61. It was said that a cross-reference to paragraphs 65 and 79 at the end of paragraph 54 was misleading and should be either deleted or relocated. A suggestion

[8] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.

was made that a reference to the impact of cost when selecting electronic means of communication should be included in paragraph 56. A suggestion to revise the heading of paragraph 57 to better reflect its content did not receive support.

Note 8 — Interim measures (paras. 58 to 61)

Paragraph 58 of the draft revised Notes

62. It was suggested that paragraph 58 should set out the general rule that the applicable arbitration law and arbitration rules usually included provisions on interim measures.

Paragraph 59 of the draft revised Notes

63. The Commission agreed that the first sentence of paragraph 59 should be clarified to provide that when it was possible for a party to request an interim measure from a domestic court before or during the arbitral proceedings, an established principle was that such a request would not be incompatible with an agreement to arbitrate.

64. Various views were expressed on the provision that an interim measure was usually temporary in nature. A suggestion was made to delete the word "usually" as an interim measure would always be temporary. In response, it was suggested that the drafting style of the draft revised Notes catered for possible exceptions, and therefore it might be useful to retain that word. Yet, another view was that the statement on the nature of interim measures was redundant and could be deleted. In support of that suggestion, it was said that caution should be taken in defining or characterizing interim measures, which might differ according to the relevant laws or applicable arbitration rules. Another suggestion was to retain the text possibly in paragraph 58, so as to provide that a party might request a temporary relief in the form of an interim measure. During that discussion, attention was drawn to article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006[9] ("Model Law on Arbitration") and article 26(2) of the UNCITRAL Arbitration Rules (as revised in 2010)[10] which provided that "an interim measure is any temporary measure (…)".

65. After discussion, the Commission agreed that Note 8 should reflect the principle that an interim measure would be temporary in nature.

66. It was further suggested that the draft revised Notes should not appear to encourage the issuance of interim measures in the form of an award (which was usually deemed "final" and "binding") after emphasizing the temporary nature of such measures. It was also suggested that draft revised Notes should not include any provisions on the form of interim measures. In support of that suggestion, it was said that the draft revised Notes provided limited guidance on the form of an award (see Note 20). Views were also expressed that the matter of form of interim measures was beyond the scope of the draft revised Notes.

67. After discussion, it was agreed that the reference to the form of interim measures should be deleted from paragraph 59 but that issue might possibly be considered at a later stage in conjunction with the deliberation on Note 20 on requirements concerning the award. (See further para. 132 below.)

68. A suggestion to address issues pertaining to emergency arbitrator in the draft revised Notes did not receive support.

Paragraph 60 of the draft revised Notes

69. It was suggested that paragraph 60 should be revised as it could be misunderstood as obliging the arbitral tribunal to provide information to the parties relating to interim measures and it was generally not the practice for arbitral tribunals

[9] United Nations publication, Sales No. E.08.V.4.

[10] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

to provide such detailed information when confronted with a request. After discussion, it was agreed that the first sentence of paragraph 60 should be recast to set out elements for the parties and the arbitral tribunal to consider when requesting or ordering interim measures. During the discussion, particular emphasis was put on item (v) of that paragraph regarding the available mechanism for enforcement of interim measures.

70. A question was raised whether the draft revised Notes should address possible conflict of an arbitral tribunal's decision on interim measures with a court-ordered interim measure. For instance, it was questioned whether an arbitral tribunal would be bound by the court-ordered interim measure or could consider the matter de novo.

Paragraph 61 of the draft revised Notes

71. It was agreed that the second and third sentences of paragraph 61 should be retained and the square brackets deleted. It was further suggested that the second sentence of paragraph 61 should be qualified to state that the party requesting an interim measure might be liable for any costs and damages caused by the measure under applicable law, which, in most instances, would be the arbitration law.

72. A question was raised whether the words "in the circumstances then prevailing" should be deleted, as that provision, which mirrored article 17G of the Model Law on Arbitration and article 26(8) of the UNCITRAL Arbitration Rules (as revised in 2010) might not exist in the applicable law or rules. In support of retaining those words, it was said that paragraph 61 provided useful indications as to the scope and basis for the liability. The Commission recalled the extensive deliberation it had during the revision of the Model Law on Arbitration and in particular, reference was made to document A/CN.9/WG.II/WP.127 which contained an overview of legislative approaches to that question.

73. A suggestion was made that issues relating to security in connection with interim measures and liability for costs and damaged caused by such measures should be dealt with separately following the approach in the Model Law on Arbitration (arts. 17E and 17G) and the UNCITRAL Arbitration Rules (as revised in 2010) (art. 26(6) and (8)).

74. The Commission agreed that the draft revised Notes should include a provision noting that the arbitral tribunal and the parties might envisage a procedure to raise claims regarding costs and damages arising from interim measures.

Note 9 — Written submissions (paras. 62 to 64)

75. The Commission agreed that Note 9 should emphasize the need for the parties to consider how to proceed with the round(s) of written submissions and provide more information on the matter. The Commission also agreed to include a reference to arbitration rules in the last sentence of paragraph 64.

Note 10 — Practical arrangements concerning written submissions and evidence (para. 65)

76. In relation to paragraph 65, it was agreed that the list should not be presented as an exhaustive one and that the chapeau should indicate that certain sets of arbitration rules contained provisions on such practical arrangements concerning written submission and evidence.

77. A suggestion was made that the question of preservation of documents, particularly in electronic form, should be highlighted as a matter for consideration by the parties and the arbitral tribunal at the outset of the proceedings. In particular, it was noted that certain jurisdictions imposed legal obligations on the parties to preserve evidence even before the commencement of proceedings. The Commission agreed that that matter should be addressed in the draft revised Notes and possibly considered further in relation to Note 13 on documentary evidence.

Note 11 — Defining points at issue; order of deciding issues; defining relief or remedy sought (paras. 66 to 69)

Paragraph 69 of the draft revised Notes

78. The Commission agreed that paragraph 69 provided useful guidance and should be retained without the square brackets. The Commission recalled the discussion of the Working Group that in certain jurisdictions, arbitral tribunals were expected to assist the parties to avoid the case failing on reasons of form, whereas in other jurisdictions, arbitral tribunals should not be perceived as giving advice to one party (A/CN.9/826, para. 116). In the same line, it was mentioned that depending on the circumstances (including the applicable arbitration law), it might not always be appropriate for the arbitral tribunal to inform the parties of its concerns and depending on the context, the arbitral tribunal might need to take caution in raising such concerns. The Commission agreed to further consider whether paragraph 69 adequately reflected the various approaches to that matter.

Note 12 — Amicable settlement (para. 70)

Paragraph 70 of the draft revised Notes

79. A suggestion to replace the words "in appropriate circumstances" by the words "as a matter of principle" did not receive support as the paragraph reflected different approaches.

80. It was further agreed that the third sentence of paragraph 70 should not be limited to settlement "by a third party mediator", but be expanded to settlement "by any other means", which would include settlement between the parties and by a third party.

81. While a suggestion was made that paragraph 70 should provide more detail on the procedure for facilitating settlement and possible impact on the arbitral proceedings (for example, whether ex-parte communication would be allowed and the role of the tribunal if no settlement was reached), it was agreed that the current text sufficiently illustrated the different approaches with regard to amicable settlement and need not be expanded.

Note 13 — Documentary evidence (paras. 71 to 83)

Paragraphs 72 to 74 of the draft revised Notes

82. The Commission agreed to revise the sub-heading of paragraphs 72 to 74 to include not only consequences of late submission but also failure to submit as provided in paragraph 74.

83. It was agreed that paragraph 72 should include a provision that an arbitral tribunal might direct the parties to submit evidence relied upon along with their written submissions or at another time.

84. It was said that the second sentence of paragraph 73 was not a proper example of a "consequence" for late submissions. In that context, it was agreed that paragraph 73 should reflect the need for the arbitral tribunal to balance the procedural efficiency achieved by refusing late submissions and the possible usefulness of accepting late submissions. It was further mentioned that paragraph 73 should reflect the need to balance the enforcement of procedural rules with the interest of the parties (for example, providing the other party an opportunity to comment or produce further evidence with respect to the late submission).

85. In relation to paragraph 74, a number of suggestions were made. One view was that the word "inferences" was inappropriate and should be replaced by the word "conclusions" as used in the original version of the Notes. Another view was that the sentence was contradictory in the sense that the arbitral tribunal was free to draw inferences from the failure, yet had to make the award solely on the evidence before it. Yet another view was that paragraph 74 should be made consistent with article 25(b) of the Model Law on Arbitration and article 30(1)(b) of the UNCITRAL

Arbitration Rules (as revised in 2010), both addressing the situation where a respondent failed to communicate its response to the notice of arbitration or its statement of defence, whereby the arbitral tribunal would not be able to treat such failure in itself as an admission of the claimant's allegations.

86. In that context, it was highlighted that while the draft revised Notes provided that the arbitral tribunal could draw inferences from the failure to produce evidence when ordered to do so, it did not address the consequences of non-participation in the proceedings.

87. After discussion, it was agreed that paragraph 74 should be revised to provide a general rule that if a party failed to produce evidence to support its case within the time limit without showing sufficient cause, the arbitral tribunal could make the award on the evidence before it. It was further agreed that the question whether the arbitral tribunal would be free to draw any inference from a party's failure to produce specific evidence when ordered to do so by the arbitral tribunal would need to be dealt with separately in relation to paragraphs 75 and 76. (Requests to produce documentary evidence.)

Paragraphs 75 and 76 of the draft revised Notes

88. Recalling that paragraphs 75 and 76 dealt with production of documentary evidence upon the request of a party and the role of the arbitral tribunal in that procedure, the Commission noted that the practices as well as perceptions of parties might vary significantly. In order to highlight that aspect, it was agreed that the first sentence of paragraph 76 should be placed at the beginning of paragraph 75.

Paragraph 77 of the draft revised Notes

89. In relation to paragraph 77, it was suggested that the words "in the absence of a specific objection" was too definitive and that wording along the lines of paragraph 52 of the original version of the Notes ("It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time …") would be preferable.

90. Another suggestion was to delete the words "including any translation thereof" from paragraph 77 and to address the issue of translated documents separately.

Paragraph 78 of the draft revised Notes

91. It was suggested that paragraph 78 should be revised to first deal with provenance and authenticity of documents and then draw the attention of parties to issues that might arise particularly with documents disclosed only electronically or those generated electronically and disclosed in hard copy. Therefore, it was agreed that the first sentence should be deleted and the second sentence should be revised along the following lines: "If there are issues with the provenance and authenticity of the documents (…)". It was further agreed that a sentence should be added drawing the attention of the parties and the arbitral tribunal to the peculiarities of electronic documents, in particular with respect to issues that could arise with the preservation of data.

Paragraph 81 of the draft revised Notes

92. The Commission agreed that paragraph 81 should be revised to provide that the question whether to prepare a joint set of documentary evidence would often not be resolved at the outset of the proceedings but rather, if agreed, the joint set would usually be prepared before the hearings.

Paragraph 83 of the draft revised Notes

93. It was suggested that the word "expert" in the first sentence of paragraph 83 could be misleading as that word was used in a different context in Note 15. In that

regard, it was recalled that paragraph 54 of the original version of the Notes used the words "person competent in the relevant field".

94. After discussion, the Commission agreed to retain the word "expert" in paragraph 83 in the broad sense. It was further understood that if an expert in the context of Note 15 were to present a summary report referred to in paragraph 83, the procedures spelled out in Note 15 would also apply.

Note 14 — Witnesses of fact (paras. 84 to 97)

Subheading of paragraphs 84 to 88 of the draft revised Notes

95. The Commission agreed that the words "and their representatives" should be added at the end of the subheading of paragraphs 84 to 88.

Paragraphs 84 and 85 of the draft revised Notes

96. It was agreed that the draft revised Notes should include a general explanation about the term "witness statement" along the following lines: "A witness statement is a written document sufficient to serve as evidence of that witness in the matter in dispute." While a suggestion was made that the draft revised Notes could illustrate certain requirements of a witness statement (for instance, that it be signed by the witness), it was generally agreed that that was not necessary.

Paragraph 86 of the draft revised Notes

97. It was suggested that the first sentence of paragraph 86 was too definitive and thus could be combined with the second sentence. It was mentioned that the first sentence provided useful guidance on the fact that written statements need not be repeated orally either in full or in part, which should be retained in the draft revised Notes.

98. The Commission agreed that the words "or updating" should be added after the word "confirmation" in the second sentence of paragraph 86. In relation to the third sentence of that paragraph, it was agreed that the words "for oral testimony by uncontroversial witnesses" should be replaced by the words "for hearing uncontroversial testimony".

Paragraph 87 of the draft revised Notes

99. As a matter of drafting, it was agreed that the words "refer to" should be replaced by the word "identify".

Paragraph 88 of the draft revised Notes

100. It was suggested that the first sentence of paragraph 88 should clarify whether it applied only to the party's witness or also to the other party's witness. While a suggestion was made that the third sentence could be deleted as the fourth sentence made it redundant, it was stated that the third sentence reflected the recent trend in international arbitration with respect to pre-testimony contacts with witnesses.

101. It was agreed that paragraph 88 should be expanded to explain the various approaches for further consideration by the Commission. It was also agreed that the last sentence of paragraph 88 should be expanded with respect to issues raised by the parties' involvement in the preparation of oral testimony by witnesses.

Paragraph 90 of the draft revised Notes

102. The Commission agreed that paragraph 90 should be revised to first address who would be responsible for questioning the witnesses and then the degree of control over the hearings.

Paragraph 92 of the draft revised Notes

103. The Commission agreed to revise paragraph 92 to: (a) express more clearly the various practices in relation to the presence of witnesses in the hearing room before and after they have testified; (b) provide that to the extent that witnesses were not allowed in the hearing room, it would be important that those witnesses should also not have access to any contemporaneous transcripts of the hearings; (c) indicate that witnesses should not discuss their testimony during any interruption thereof; and (d) include more detailed information about the presence of parties' representatives in the hearing room, as their exclusion from the hearing room required a different treatment.

104. It was agreed that requirements in paragraphs 89 to 93 (manner of taking oral evidence) should also apply to witnesses that provided their testimony remotely via technological means.

Paragraphs 94 and 95 of the draft revised Notes

105. It was suggested that the words "and questioned" could be added at the end of the subheading to paragraphs 94 and 95.

106. In relation to the third sentence of paragraph 94, it was noted that it was usually the party calling the witnesses that would select the order in which it wished to have its witnesses called, particularly as it would be in a better position to know the availability of the witnesses. In that context, a question was raised whether the party cross-examining would have a say in choosing the order.

107. A suggestion was made that paragraph 95 should be reviewed in conjunction with paragraph 86 to avoid any inconsistency and touch upon the interrelationship between written and oral statements. A question was raised whether the draft revised Notes should deal with presentation of new evidence during the hearings.

108. In relation to the last sentence of paragraph 95, it was suggested that the cross-examining party should also be able to re-examine the witness in addition to the party calling that witness. Accordingly, it was said that a sentence should be added stating the possibility for the arbitral tribunal and/or the cross-examining party to further question the witness after re-examination by the party calling the witness. It was further agreed that re-examination should be limited to issues raised during the cross-examination.

Paragraph 96 of the draft revised Notes

109. In relation to paragraph 96, it was agreed that: (a) the words "in any way related to" in the first sentence and the words in the parentheses in the last sentence should be clarified; (b) reference should also be made to arbitration practice in the second sentence; and (c) the words "whether statements from such persons may be submitted and considered" in the third sentence should be deleted as representatives should not be prohibited from submitting statements.

Paragraph 97 of the draft revised Notes

110. It was agreed that paragraph 97 should be revised to: (a) clarify that it only applied to witnesses invited to testify; (b) set out possible consequences for non-appearance of a witness; and (c) state that the arbitral tribunal should be given some flexibility to deal with the non-appearance of a witness including what weight to be given to the written statement, if any, of that witness.

Possible application of the UNCITRAL Transparency Rules

111. In response to a question on how paragraphs 92 and 93 would apply when the hearing would be made public (for example, under the UNCITRAL Transparency Rules), it was agreed that the footnote to paragraph 53 could be elaborated to provide that the UNCITRAL Transparency Rules could have an impact on other aspects of the proceedings.

Note 15 — Experts and expert witnesses (paras. 98 to 111)

112. The Commission agreed that Note 15 should make consistent use of the term "expert opinion".

113. A suggestion was made that the term "expert witnesses" should be used in Note 15 to refer to both experts presented by the parties and those appointed by the arbitral tribunal. It was further said that both categories of experts gave opinion, and therefore, should not be distinguished by using different terms. That suggestion did not receive support.

114. In that context, it was pointed out that the terms currently used in Note 15 to refer to the different categories of experts were consistent with the UNCITRAL Arbitration Rules (as revised in 2010), in particularly article 29, where the term "experts appointed by the arbitral tribunal" was used. It was further pointed out that a party could present both "witness of fact" and "expert witness" whereas the arbitral tribunal would appoint its "expert". It was also pointed out that not all legal systems were familiar with the notion of "expert witness" and therefore, it might be useful for it to be elaborated in the draft revised Notes. It was suggested to refer to the practice of requiring experts to detail their expertise by providing a resume or a list of recent experience.

Paragraph 100 of the draft revised Notes

115. The Commission agreed to provide more information about practices regarding the presentation of points of agreement and disagreement by expert witnesses.

Paragraphs 105 to 109 of the draft revised Notes

116. The Commission agreed to include a provision highlighting that the arbitral tribunal should take into account efficiency of the proceedings when deciding whether to appoint an expert.

117. The Commission agreed to replace the word "may" in the second sentence of paragraph 106 by the words "will usually" to clarify that it was usual practice for the arbitral tribunal to give parties an opportunity to comment on the expert's qualifications, impartiality and independence.

118. The Commission agreed to further consider the suggestion that paragraph 108 should provide that the arbitral tribunal might instruct its expert to observe due process in its communication with the parties. It was said that the question whether a tribunal-appointed expert should refrain from ex-parte communication was treated differently in various jurisdictions.

119. A suggestion to replace the word "comment" in paragraph 109 by the word "make submissions" did not receive support, as parties might not necessarily make formal submissions on expert opinions. The Commission agreed that paragraph 109 should also provide that, depending on circumstances, the parties would be given an opportunity to question a tribunal-appointed expert and agreed that the text could reflect the ability to present formal as well as informal submissions.

120. It was said that under some systems of law, expert opinions were treated as evidence by the arbitral tribunal. A question was raised whether expert opinions would always be treated as evidence by the arbitral tribunal once they were presented.

Paragraphs 110 and 111 of the draft revised Notes

121. A question was raised whether paragraphs 110 and 111 applied to both expert witnesses and tribunal-appointed experts. It was suggested that those paragraphs should be revised to clarify that: (a) terms of reference would usually be established for tribunal-appointed experts; and (b) terms of reference established by a party and its expert witness would usually not be shared and the relevant information listed in paragraphs 110 and 111 would be contained in the expert opinion.

122. It was agreed that the remuneration of the tribunal-appointed expert was an item to be included in its terms of reference. It was agreed that the draft revised Notes should point out that arbitral tribunals might wish to ensure that they were not held responsible in case the remuneration exceeded the amount initially indicated. During the deliberation, it was underlined that the terms of reference were important to ensure that the relationship between the arbitral tribunal and the expert would be transparent.

Note 16 — Other evidence (paras. 112 to 117)

Paragraphs 112 and 114 of the draft revised Notes

123. It was noted that the words "called upon" in the first sentence of paragraph 112 should not be interpreted as limiting the arbitral tribunal's ability to assessing physical evidence only when there was a request from a party. In relation to paragraph 114, it was agreed to replace the word "desirable" by the word "adequate".

124. While a suggestion was made that the draft revised Notes might address the possible complexities that might arise when sites, property, or goods to be inspected were under the control of a third party, it was generally felt that there was little guidance that could be provided on that issue.

Note 17 — Hearings (paras. 118 to 129)

125. A number of suggestions were made in relation to Note 17. One suggestion was to include a reference to "arbitration law" in the first sentence of paragraph 118. Another suggestion was that examples provided in parentheses in paragraph 121 should relate more closely to hearings (for example, availability of the witnesses). Yet another suggestion was that the words "submissions in relation to hearings" in the subheading to paragraphs 118 to 121 should be replaced by the words "post-hearing submissions". In relation to paragraph 126, it was suggested that the arbitral tribunal should set aside time for deliberations not only before or shortly after the close of the hearings but throughout the entire arbitration process. With respect to the second sentence of paragraph 127, it was suggested that more guidance should be provided on which of the parties had the last word, while approaches diverged on that matter. It was further suggested that paragraph 128 should provide that transcription by a person not present at the hearing of an audio recording could in some cases be extremely cumbersome and costly. All of the above-mentioned suggestions received support and it was agreed that Note 17 should be revised accordingly.

Note 18 — Multiparty arbitration (paras. 130 and 131) and Note 19 — Joinder and consolidation (paras. 132 to 136)

126. In relation to Notes 18 and 19, it was agreed to further consider whether the draft revised Notes should provide information about the issues that might arise from multiple arbitration agreements and from parallel proceedings.

127. In response to a suggestion that the paragraphs on joinder should provide more guidance on the criteria to be used by an arbitral tribunal in allowing joinders, it was suggested that procedural efficiency could be added to complement the criteria in paragraph 133.

Note 20 — Possible requirements concerning the award (paras. 137 to 139)

128. A suggestion was made that Note 20 should either be deleted as it was beyond the scope of the draft revised Notes or, if retained, elaborated further to discuss the wide range of issues that might arise particularly with regard to the form and content of the award (for example, whether the award would need to be signed by the arbitrators, whether electronic signatures could be used where the arbitrators were in different locations, whether hard copies of the award would need to be produced, and how decisions would be made and recorded when there were more than one arbitrator).

129. However, it was widely felt that Note 20 sufficiently dealt with the procedural aspects limited to the filing or delivering of the award, similar to the original version of the Notes.

130. A suggestion to include a provision similar to that found in paragraph 44 on regulatory issues and issues arising from restrictions on trade or payment when formulating an award did not receive support.

131. After discussion, it was agreed that Note 20 should be retained in the current form with possible amendments to its heading to better reflect the content of paragraphs 138 to 139.

132. After its deliberation of Note 20, the Commission further agreed that it would not be necessary for the draft revised Notes to include a provision on the form of interim measures (see paras. 66 and 67 above).

3. Provisional approval of the draft revised Notes

133. The Commission approved the draft revised Notes in principle and requested the Secretariat to revise the draft text in accordance with the deliberations and decisions (see section 2 above). It was agreed that the Secretariat could seek input from Working Group II on specific issues, if necessary, during its sixty-fourth session. The Commission further requested that draft revised Notes be finalized for adoption by the Commission at its forty-ninth session, in 2016.

B. Planned and possible future work

134. Upon completion of its deliberation on the revision of the Notes, the Commission held a preliminary discussion regarding future work in the area of international arbitration and conciliation. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 18 (Work programme of the Commission) (see para. 341 below).

1. Enforcement of settlement agreements resulting from international commercial conciliation/mediation

135. The Commission recalled that at its forty-seventh session, in 2014, it had agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission on the feasibility and possible form of work in that area.[11] At that session, the Commission also invited delegations to provide information to the Secretariat in respect of that subject matter.[12] Accordingly, the Commission had before it a compilation of responses received by the Secretariat (A/CN.9/846 and addenda).

136. The Commission noted that the Working Group at its sixty-second session considered the topic of enforcement of international settlement agreements resulting from conciliation proceedings (A/CN.9/832, paras. 13-59). At that session, while a number of questions and concerns were expressed, it had been generally felt that they could be addressed through further work on the topic (A/CN.9/832, para. 58). The Working Group, therefore, suggested that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

137. The Commission recalled that it had previously considered the issue of enforcement of international settlement agreements when preparing the UNCITRAL

[11] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.
[12] Ibid.

Model Law on International Commercial Conciliation (2002)[13] ("Model Law on Conciliation"). Reference was made to article 14 of the Model Law on Conciliation which stated the principle that settlement agreements were enforceable, without attempting to specify the method by which such settlement agreements might be enforced, a matter that was left to each enacting State.

138. There was general support to resume work in that area with the aim to promote conciliation as a time- and cost-efficient alternative dispute resolution method. It was said that an instrument in favour of easy and fast enforcement of settlement agreements resulting from conciliation would further contribute to the development of conciliation. It was further pointed out that the lack of a harmonized enforcement mechanism was a disincentive for businesses to proceed with conciliation, and that there was a need for greater certainty that any resulting settlement agreement could be relied on.

139. However, doubts were expressed on whether it would be desirable to have a harmonized enforcement mechanism as it might have a negative impact on the flexible nature of conciliation. Another concern was whether it would be feasible to provide a legislative solution on enforcement of settlement agreements beyond article 14 of the Model Law on Conciliation. Furthermore, it was pointed out that procedures for enforcing settlement agreements varied greatly between legal systems and were dependent upon domestic law, which did not easily lend themselves to harmonization.

140. Nonetheless, it was stated that legislative frameworks on enforcement of settlement agreements were being developed domestically and that it might be timely to consider developing a harmonized solution. It was suggested that work on the topic should generally not dwell into the domestic procedures; instead, a possible approach could be to introduce a mechanism to enforce international settlement agreement, possibly modelled on article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[14] (the "New York Convention").

141. In response to the view that work on settlement agreements might overlap with existing work by other organizations (for instance, the judgements project of the Hague Conference on Private International Law), it was said that work of other organizations had a different focus and that the Commission would be a suitable forum for discussion on the topic.

142. After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.

2. Concurrent proceedings

143. On the issue of concurrent proceedings, the Commission recalled that, at its forty-seventh session, in 2014, it agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area and that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration.[15] The Commission requested the Secretariat to report to the Commission outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[16]

144. In accordance with that request, the Commission had before it a note by the Secretariat in relation to concurrent proceedings in investment arbitration

[13] General Assembly resolution 57/18, annex.
[14] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.
[15] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 130.
[16] Ibid.

(A/CN.9/848). The Commission expressed its appreciation to the Secretariat for the note, which outlined the practical issues, the variety of situations that led to concurrent proceedings, the various options available to address those issues, and the possible form of any instrument to be developed in that area.

145. There was general support for retaining the topic of concurrent proceedings on the agenda of the Commission. It was highlighted that concurrent proceedings have proven to be detrimental to investment practice and thus was of particular interest to States. While support was expressed for the Working Group to undertake work on the topic as a matter of priority, it was widely felt that it was premature at this stage, and work should be undertaken only after a thorough analysis of the issues.

146. Accordingly, it was suggested that the Secretariat should keep abreast of developments in that area, provide further analysis and set out the issues and possible solutions in a neutral manner, which would assist the Commission making an informed decision at a later stage. It was suggested that, consistent with the request of the Commission in 2014, work on the topic should also take into consideration concurrent proceedings in international commercial arbitration.

147. After discussion, the Commission requested the Secretariat to explore the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.

3. Code of ethics/conduct for arbitrators

148. The Commission had before it a proposal for future work on a code of ethics for arbitrators in investment arbitration (A/CN.9/855), which suggested that work on the topic could relate to conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.

149. There was general interest in the topic, which could be explored taking into account the wide range of issues and approaches. In particular, it was widely felt that future work in that area should not be limited to investment arbitration but also deal with international commercial arbitration. In response, it was noted that the peculiarities of investment arbitration might require a slightly different approach.

150. It was suggested that existing laws, regulation and rules (for example, provisions on disclosure in relation to impartiality and independence) that had an impact on the conduct of arbitrators should be identified. It was also suggested that work conducted by other organizations on the topic would need to be considered. In that context, it was noted that in international arbitration, counsels for the parties as well as the arbitral tribunals could be bound by more than one standard of ethics depending on their nationality, affiliation with bar associations as well as place of arbitration.

151. After discussion, the Commission requested the Secretariat to explore the topic in a broad manner, including both in the field of commercial and investment arbitration, taking into account existing laws, rules and regulations as well as any standards established by other organizations. The Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.

C. Establishment and functioning of the transparency repository

152. The Commission recalled that, under article 8 of the UNCITRAL Transparency Rules, the repository of published information under the Rules (the “transparency repository”) had to be established.

153. The Commission further recalled that, at its forty-sixth session, in 2013, it expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of the transparency repository. At that session, it was said that the United Nations, as a neutral and universal body, and its secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core

functions of a transparency repository, as a public administration directly responsible for the servicing and proper operation of its own legal standards.[17]

154. The Commission also recalled that, at its forty-seventh session, in 2014, the Secretariat had reported on steps taken in respect of the repository function to be performed, including the preparation of a dedicated web page (www.uncitral.org/transparency-registry). At that session, the Commission was informed that in line with the request by some States that the additional mandate bestowed on the UNCITRAL secretariat be fulfilled on a cost-neutral budgetary basis in relation to the United Nations regular budget, efforts were made to establish the transparency repository as a pilot project temporarily funded by voluntary contributions. Accordingly, the Commission, at that session, reiterated its mandate to its secretariat to establish and operate the transparency repository, initially as a pilot project, and, to that end, to seek any necessary funding.[18]

155. The Commission was informed that the General Assembly, in its resolution on the report of the Commission on the work of its forty-seventh session noted with appreciation that the secretariat of the Commission had taken steps to establish and operate the transparency repository, as a pilot project temporarily funded by voluntary contributions, and in that regard requested the Secretary-General to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository.[19]

156. In that context, the Commission heard an oral report on the steps taken by the Secretariat to establish and operate the transparency repository and the difficulties it was facing.

157. The Commission first took note of the view that the current wording in the General Assembly resolution might be seen as not constituting a proper mandate for the Secretariat because the General Assembly did not specifically "request" the Secretary-General to establish and operate the transparency repository. It also took note of the view that additional procedures contemplated in the Rules of Procedure of the General Assembly as well as the Financial Regulations and Rules of the United Nations should have been followed despite the fact that the transparency repository was to be fully funded by voluntary contributions.

158. With respect to the budget situation, the Commission was informed that the Secretariat had received confirmation from the Fund for International Development (OFID) of the Organization of the Petroleum Exporting Countries (OPEC) for a grant of 125,000 USD, in addition to the European Union's commitment for 100,000 EUR, which would allow the Secretariat to operate the project on a temporary basis until the end of 2016. The Commission was also informed that the Secretariat was currently formalizing the funding arrangements with the donors, and the Commission expressed its great appreciation to the European Union and OFID for their commitments.

159. It was further noted that the operation of the transparency repository would not raise any liability issues as article 3 of the UNCITRAL Transparency Rules provided that the repository would not be involved in any decision-making regarding the information to be published. Finally, the Commission took note of the possible scenarios upon the end of the pilot project which could be: (a) continuing to operate entirely on extrabudgetary resources; (b) seeking regular budget resources or redeploying resources within the Secretariat; and (c) possibly entrusting entities outside the United Nations with that function.

160. During the discussion, the Commission emphasized that the transparency repository should be fully operational as soon as possible, as the repository constituted a central feature of both the UNCITRAL Transparency Rules and the Mauritius Convention on Transparency[20] by providing a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations

[17] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 79-98.
[18] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 108-110.
[19] General Assembly resolution 69/115, para. 3.
[20] General Assembly resolution 69/116, annex.

conducted pursuant to the Rules and the Convention. It was also highlighted that the operation of the transparency repository by the secretariat of the Commission would be perceived as a robust signal in support of transparency in investor-State treaty-based arbitration and the relevant UNCITRAL texts on transparency.

161. After discussion, the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should fulfil the role of the transparency repository and that it should establish and operate the transparency repository, initially as a pilot project. To that end, the Commission agreed to recommend to the General Assembly that it request the secretariat of the Commission to establish and operate the repository of published information under the UNCITRAL Transparency Rules, in accordance with article 8 of the Rules, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions.

D. International commercial arbitration and mediation moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

162. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-second Moot, the oral arguments phase of which had taken place in Vienna from 27 March to 2 April 2015. As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams in the Twenty-second Moot were based on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[21] (the "United Nations Sales Convention"). A total of 298 teams from 72 jurisdictions participated and the best team in oral arguments was Ottawa University (Canada). The oral arguments phase of the Twenty-third Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 18 to 24 March 2016.

163. It was also noted that the Vis East Moot Foundation had organized the Twelfth Willem C. Vis (East) International Commercial Arbitration Moot, which had been co-sponsored by the Commission and the East Asia Branch of CIARB. The final phase took place in Hong Kong, China, from 15 to 22 March 2015. A total of 107 teams from 29 jurisdictions participated in the Twelfth (East) Moot and the best team in oral arguments was Singapore Management University (Singapore). The Thirteenth (East) Moot would be held in Hong Kong, China, from 6 to 13 March 2016.

2. Madrid Commercial Arbitration Moot 2015

164. It was noted that Carlos III University of Madrid had organized the Seventh International Commercial Arbitration Competition in Madrid from 20 to 24 April 2015, which had been co-sponsored by the Commission. Legal issues addressed by the teams related to an international master franchising contract and sale of goods, where the United Nations Sales Convention, the New York Convention, the Unidroit texts on franchising and the Rules of Arbitration of the Court of Arbitration of Madrid[22] were applicable. A total of 30 teams from 13 jurisdictions participated in the Madrid Moot which was held in Spanish. The best team in oral arguments was Pontificia Universidad Católica del Perú (Peru). The Eighth Madrid Moot would be held from 25 to 29 April 2016.

3. Mediation and negotiation competition

165. It was noted that the first mediation and negotiation competition organized jointly by IBA and VIAC had taken place in Vienna from 1 to 4 July 2015 and had been co-sponsored by the Commission. Legal issues addressed by the teams had been those addressed at the Twenty-second Willem C. Vis International Commercial

[21] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[22] Available from www.camaramadrid.es/doc/linkext/rules-of-arbitration.pdf.

Arbitration Moot (see para. 162 above). A total of 16 teams from 13 jurisdictions had participated.

IV. Consideration of issues in the area of security interests

A. Introduction

166. The Commission recalled that, at its forty-sixth session, in 2013, it had confirmed its decision that Working Group VI (Security Interests) should prepare a model law on secured transactions (the "draft Model Law") based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions[23] (the "Secured Transactions Guide") and consistent with all texts prepared by the Commission on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[24] (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property[25] (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry[26] (the "Registry Guide").[27] The Commission also recalled that, at its forty-seventh session, in 2014, it had requested the Working Group to expedite its work to complete the draft Model Law and submit it to the Commission for adoption.[28]

167. At its current session, the Commission had before it the reports of the twenty-sixth and twenty-seventh sessions of the Working Group (A/CN.9/830 and A/CN.9/836, respectively), as well as two notes by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/852 and A/CN.9/853). The Commission noted that at its twenty-sixth and twenty-seventh sessions the Working Group completed the second reading of the draft Model Law. In addition, the Commission noted with appreciation that, at its twenty-seventh session, the Working Group approved the substance (i.e. the policy) of the provisions of several chapters of the draft Model Law and submitted to the Commission for approval in principle (i.e. approval of the policy) the registry-related, the conflict-of-laws and the transition provisions of the draft Model Law (A/CN.9/836, para. 122). Moreover, the Commission noted that, at that session, the Working Group recommended the preparation of a guide to enactment of what would become the UNCITRAL Model Law on Secured Transactions (the "Guide to Enactment") (A/CN.9/836, para. 121).

168. The Committee of the Whole, established by the Commission at its current session (see para. 12 above), proceeded with the consideration of agenda item 5(a), Consideration and provisional approval of parts of a model law on secured transactions, on the basis of a note by the Secretariat (A/CN.9/852). The Commission also considered a proposal submitted by the delegation of the United States of America. The report of the Committee is reproduced in section B.1 below.

B. Consideration and provisional approval of parts of a model law on secured transactions

1. Report of the Committee of the Whole

Article 26 of the draft Model Law: Establishment of a national public registry and public access

169. It was noted that chapter IV of the draft Model Law on the registry system was reduced to one article and the registry-related text was included in the draft Registry

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[23] United Nations publication, Sales No. E.09.V.12.
[24] General Assembly resolution 56/81, annex.
[25] United Nations publication, Sales No. E.11.V.6.
[26] United Nations publication, Sales No. E.14.V.6.
[27] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.
[28] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

Act on the understanding that, as provided in article 26 of the draft Model Law, the registry-related provisions set forth in the draft Registry Act might be implemented in the law enacting the draft Model Law, a separate act, decree or regulation, or a combination thereof. On the understanding that the name and the location of the draft Registry Act would be discussed after the Committee had discussed all the registry-related provisions, the Committee approved the substance of article 26 of the draft Model Law unchanged. In that connection, the Committee agreed that the Secretariat was authorized to introduce any necessary drafting changes in article 26 of the draft Model Law and the provisions of the draft Registry Act.

170. In addition, it was agreed that the definitions of the Registry Guide should be included in the draft Registry Act. Moreover, it was agreed that the Guide to Enactment should discuss: (a) the registration of notices other than security right notices (e.g. enforcement notices, notices of preferential claims or judgement claims); and (b) that, in line with recommendation 54, subparagraph (j), of the Secured Transactions Guide and recommendation 5 of the Registry Guide, the Registry should be fully electronic, if possible, explaining the different possible levels (e.g. a database, as first level, then electronic registration and access, etc.).

Article 1 of the draft Registry Act: One notice sufficient for multiple security rights

171. It was agreed that article 1 of the draft Registry Act should be revised to better reflect the policy that one notice might relate to security rights created under multiple security agreements between the parties identified in the registered notice. Subject to that change, the Committee approved the substance of article 1 of the draft Registry Act.

172. In addition, it was agreed that a new provision should be inserted within square brackets at the beginning of the draft Registry Act to address the purpose of the draft Registry Act and its relationship to the draft Model Law. Moreover, it was agreed that the Guide to Enactment should explain that that provision would be necessary only if the enacting State decided to implement the draft Registry Act in a law other than the law that would implement the draft Model Law.

Article 2 of the draft Registry Act: Advance registration

173. It was agreed that article 2 of the draft Registry Act should be revised to refer to any notice, since, if an initial notice had been registered in advance of the creation of a security right and ultimately the security right was not created, a cancellation notice would need to be registered. In addition, it was agreed that the Guide to Enactment should explain that matter. Moreover, it was agreed that article 2 should refer to a security agreement "between the parties identified in the registered notice". Subject to those changes, the Committee approved the substance of article 2 of the draft Registry Act.

Article 3 of the draft Registry Act: Grantor's authorization for registration

174. It was agreed that article 3 of the draft Registry Act should be revised so that: (a) paragraphs 1, 2 and 3 would provide that the registration of a notice would be ineffective unless authorized by the grantor; (b) subparagraph 2(a) would refer to the security agreement or another agreement with the grantor identified in the registered notice; and (c) subparagraph 2(b) should be deleted, since the matter was sufficiently addressed in paragraph 3, according to which in the case of the addition of a new grantor, the amendment notice should be authorized by the new grantor (and not permit the existing grantor to prevent the addition of a new grantor). It was also agreed that the Guide to Enactment should clarify that paragraph 3 did not apply to a situation where there was no new grantor but rather a change of the name of the grantor. Subject to those changes, the Committee approved the substance of article 3 of the draft Registry Act.

Article 4 of the draft Registry Act: Public access conditions

175. It was agreed that article 4 of the draft Registry Act should be revised so that: (a) a second paragraph would be inserted to refer to the security procedures for a person to obtain access to the registry services (and thus the risk of the registration of amendment and cancellation notices not authorized by the secured creditor would be minimized; see article 20 of the draft Registry Act); and (b) paragraph 3 would refer to the obligation of the Registry to communicate the reason for refusing access "without delay". It was also agreed that the Guide to Enactment should clarify that: (a) the term "notice form" included both a paper and an electronic form (or screen); (b) any security procedures (or other policy matter) should be prescribed by the Registry only if the Registry was a governmental authority, and, otherwise, by the governmental authority supervising the Registry (see article 26 of the draft Registry Act). Subject to those changes, the Committee approved the substance of article 4 of the draft Registry Act.

Article 5 of the draft Registry Act: Rejection of the registration of a notice or a search request

176. It was agreed that paragraph 3 of article 5 of the draft Registry Act should be revised to refer to the obligation of the Registry to communicate the reason for the rejection of a notice or search request "without delay". Subject to that change, the Committee approved the substance of article 5 of the draft Registry Act.

Article 6 of the draft Registry Act: No verification of information in a notice by the Registry

177. It was agreed that article 6 of the draft Registry Act should be revised so that: (a) the bracketed text in paragraph 1 would be deleted as unnecessary; and (b) a third paragraph should be inserted to provide that, except as provided in article 5 of the draft Registry Act, the Registry was not entitled to reject or conduct any scrutiny of the content of a search request. Subject to those changes, the Committee approved the substance of article 6 of the draft Registry Act.

Article 7 of the draft Registry Act: Information required in an initial notice

178. It was agreed that the words "permit or" in subparagraph (a) of article 7 of the draft Registry Act should be deleted, since the article dealt with information "required" in an initial notice. It was also agreed that the Guide to Enactment should clarify that: (a) the additional information referred to in subparagraph (a) would not be part of the grantor identifier; (b) some States used additional information (e.g. unique ID numbers) as grantor identifiers; and (c) a notice might relate to more than one grantor or secured creditor and the required information should be entered separately for each grantor or secured creditor. Subject to those changes, the Committee approved the substance of article 7 of the draft Registry Act.

Article 8 of the draft Registry Act: Grantor identifier

179. It was agreed that article 8 of the draft Registry Act should be revised so that: (a) its structure would be aligned more closely with the structure of recommendation 24 of the Registry Guide; (b) the wording of the chapeau of paragraph 1 would be aligned with paragraph 2 to state that "where the grantor is a natural person, the grantor identifier is"; and (c) subparagraph 1 (c) would state more clearly that it referred to the grantor's "legal name" that might not be reflected in any official document. It was also agreed that the Guide to Enactment should: (a) mention examples of official documents and the hierarchy among them (see the Registry Guide, paras. 163-168); and (b) draw the attention of enacting States to the need to deal with identifiers of foreign grantors (see the Registry Guide, para. 169). Subject to those changes, the Committee approved the substance of article 8 of the draft Registry Act.

Article 9 of the draft Registry Act: Secured creditor identifier

180. It was agreed that article 9 of the draft Registry Act should be revised so that reference would be made to the possibility that the secured creditor identifier might be the name of the secured creditor or its representative. It was also agreed that the Guide to Enactment should explain the meaning of the term "representative" and that, as registration did not create the security right, the representative was not the actual holder of the security right. Subject to those changes, the Committee approved the substance of article 9 of the draft Registry Act.

Article 10 of the draft Registry Act: Description of encumbered assets

181. It was agreed that article 10 of the draft Registry Act should be revised to reflect the rules stated therein more clearly. It was also agreed that the Guide to Enactment should clarify that: (a) the description in the notice did not need to be identical to that in the security agreement; (b) to the extent that the description in the notice exceeded the description in the security agreement, the notice would not make effective against third parties a security right in such assets; (c) reference to an asset in a registered notice would not imply or represent that the grantor presently or in the future would have rights in the asset; and (d) a description by quantity or computational formula would meet the standard indicated in article 10. Subject to those changes, the Committee approved the substance of article 10 of the draft Registry Act.

Article 11 of the draft Registry Act: Language of information in a notice

182. It was agreed that article 11 should be revised to state that all information contained in a notice, except the names and addresses of the grantor and the secured creditor, ought to be expressed in the language to be specified by the enacting State.

183. However, differing views were expressed as to the legal consequence of a failure of the registrant to express that information in the language to be specified by the enacting State. One view was that, in such a case, the notice should be ineffective. Another view was that the notice should not be ineffective unless the failure of the registrant to comply would seriously mislead a reasonable searcher (the test in art. 23, para. 2, of the draft Registry Act). In that connection, it was stated that, if the description of an encumbered asset was not in the language specified by the enacting State, the notice should not be ineffective with respect to other encumbered assets, the description of which was in the appropriate language (a rule along the lines of art. 23, para. 4, of the draft Registry Act). After discussion, the Committee requested the Secretariat to prepare options to reflect the various views expressed.

184. With respect to the character set in which information in a notice should be expressed, it was agreed that it should be the character set specified and publicized by the Registry. In that connection, it was agreed that the Guide to Enactment should clarify that: (a) if the information in a notice was not expressed in the character set specified and publicized by the Registry, the information in the notice would not be legible for the Registry and thus the notice would be rejected under article 5, subparagraph 1 (b); and (b) if the Registry was not a governmental authority, the character set should be specified, publicized and modified only by the governmental authority supervising the Registry.

185. Subject to the above-mentioned changes, the Committee approved the substance of article 11 of the draft Registry Act.

Article 12 of the draft Registry Act: Time of effectiveness of the registration of a notice

186. It was agreed that article 12 of the draft Registry Act should be revised so that: (a) the material relating to initial or amendment notices would be grouped together and the material relating to cancellation notices would also be grouped together; (b) paragraph 2 would be aligned more closely with recommendation 11, subparagraph (c), of the Registry Guide; (c) paragraph 4 would refer to the words "without delay" (see para. 175 above); and (d) paragraph 5 would refer to the

obligation of the Registry to "record" the date and time of the registration of a notice and to make it available upon request. Subject to those changes, the Committee approved the substance of article 12 of the draft Registry Act.

Article 13 of the draft Registry Act: Period of effectiveness of the registration of a notice

187. It was agreed that article 13 of the draft Registry Act should be revised so that: (a) paragraph 1 in all options would refer to the initial notice; and (b) a fourth paragraph would be added to all options to state explicitly what was implicit but unstated, namely that the period of effectiveness might be extended more than once. Subject to those changes, the Committee approved the substance of article 13 of the draft Registry Act.

Article 14 of the draft Registry Act: Obligation to send a copy of a registered notice

188. Recalling its earlier decision as to the time within which a prescribed action should be taken (see para. 175 above), the Committee agreed that in paragraph 1 of article 14 of the draft Registry Act reference should be made to the words "without delay". It was also agreed that a third paragraph should be added within square brackets to article 14 that would read along the lines of recommendation 55, subparagraph (c), of the Secured Transactions Guide to deal with the limitation of the liability of a secured creditor for failure to send a copy of the registered notice to the person identified in the notice as the grantor. Subject to those changes, the Committee approved the substance of article 14 of the draft Registry Act (see further para. 198 below).

189. It was also agreed that a new article should be inserted into the draft Registry Act to provide that, upon request by the person identified in the notice as the grantor, the Registry ought to provide information with respect to the identity of the registrant. In that connection, the Committee noted that, under article 4, subparagraph 1 (b), of the draft Registry Act, a registrant ought to identify itself, and, under article 6, paragraph 1, of the draft Registry Act, the Registry ought to maintain information about the registrant's identity.

Article 15 of the draft Registry Act: Right to register an amendment or cancellation notice

190. It was agreed that the terminology (i.e. "secured creditor or its representative" and "the person identified in the notice as the secured creditor") used in various articles of the draft Registry Act, such as article 7, subparagraph (b), article 9, paragraph 1, as revised (see para. 180 above) and article 15, paragraph 1, should be reviewed to ensure clarity and consistency. In that connection, the Committee recalled the use of terminology in the Registry Guide (see the Registry Guide, paras. 8 and 9) and the fact that reference needed to be made in some articles to the person identified in the notice as the secured creditor, since the Registry could not know who the actual secured creditor was. It was also suggested that, to draw a clear distinction between the issue of who had the right to register an amendment or cancellation notice (addressed in article 15 of the draft Registry Act) from the issue of amendment or cancellation notices that were unauthorized by the secured creditor (addressed in article 20 of the draft Registry Act), paragraph 2 should be revised to read along the following lines: "Upon registration of an amendment notice by the person identified in the initial notice as the secured creditor changing the secured creditor, only the person identified in the amendment notice as the secured creditor may register an amendment or cancellation notice". It was also agreed that the Guide to Enactment should discuss the relationship between article 15 (which stated the rule that the person identified in a notice as the secured creditor had the right to register an amendment or cancellation notice) and article 3, paragraph 5, of the draft Registry Act (which stated that any authorization required for a notice could be given before

or after registration). Subject to those changes, the Committee approved the substance of article 15 of the draft Registry Act.

Article 16 of the draft Registry Act: Information required in an amendment notice

191. The Committee approved the substance of article 16 of the draft Registry Act unchanged.

Article 17 of the draft Registry Act: Global amendment of secured creditor information

192. While some doubt was expressed as to whether article 17 of the draft Registry Act dealt with an essential registry facility, it was agreed that it was useful and should be retained (option A and the third version of option B). In addition, it was agreed that both options should clarify that they applied in the case of a change in the name (and/or address) of the secured creditor and an assignment of the secured obligation. Moreover, it was agreed that the Guide to Enactment should explain that: (a) option A could apply in the case of a fully electronic registry system, while option B could apply in the case of a registry system that would permit the registration of paper notices; (b) the introduction of special access procedures in article 4 would reduce the risk of unauthorized global amendments; and (c) the Registry would need to organize the registry record so as to facilitate global amendments, in particular as the secured creditor identifier was not a publicly available search criterion under article 21 of the draft Registry Act. Subject to those changes, the Committee approved the substance of article 17 of the draft Registry Act.

Article 18 of the draft Registry Act: Information required in a cancellation notice

193. The Committee approved the substance of article 18 of the draft Registry Act unchanged.

Article 19 of the draft Registry Act: Compulsory registration of an amendment or cancellation notice

194. It was agreed that paragraph 1 of article 19 of the draft Registry Act should be reorganized to deal first with the conditions for the registration of an amendment notice and then with the conditions for the registration of a cancellation notice. In addition, it was agreed that, in subparagraph 1 (b), reference should be made to any authorization by the grantor required for an amendment notice under article 3. Moreover, it was agreed that the payment of any fees under paragraphs 2 and 4 should not create any obstacle to the registration of an amendment or cancellation notice. It was also agreed that paragraph 6 should be deleted, since it was ambiguous and dealt with a matter typically addressed in civil procedure law.

195. It was also agreed that the Guide to Enactment should explain that, under article 19: (a) the secured creditor had an independent obligation to register an amendment or cancellation notice within a reasonable period of time after it became aware that any of the conditions in paragraph 1 were met; (b) liability for violations of the obligations provided for in article 19 was left to the law of the enacting State on liability for violations of statutory obligations; and (c) if the secured creditor did not comply with its obligation, the grantor had a right to seek the registration of an amendment or cancellation notice through a summary judicial or administrative procedure. It was also agreed that the Guide to Enactment could invite enacting States to identify the court or other authority that would have jurisdiction to consider a request under article 19 and other provisions of the Registry Act.

196. Subject to the above-mentioned changes, the Committee approved the substance of article 19 of the draft Registry Act.

Article 20 of the draft Registry Act: Amendment or cancellation notices not authorized by the secured creditor

197. It was agreed that all four options of article 20 of the draft Registry Act should be retained. In addition, it was agreed that the Guide to Enactment should discuss the different policy choices offered by each option and the impact of the design of the registry system on the choice of an option. Subject to those changes, the Committee approved the substance of article 20 of the draft Registry Act.

198. In the discussion of article 20, it was suggested that article 14 of the draft Registry Act might need to clarify that the Registry was obliged to send to the person identified in the notice as the secured creditor any notice, including amendment and cancellation notices. It was also suggested that the placement of article 14 in the draft Registry Act might need to be reviewed to avoid giving the impression that article 14 applied only to initial notices.

Article 21 of the draft Registry Act: Search criteria

199. The Committee approved the substance of article 21 of the draft Registry Act unchanged.

Article 22 of the draft Registry Act: Search results

200. The view was expressed that article 22 of the draft Registry Act should deal only with the obligation of the Registry to provide a search result upon request. It was stated that the question of whether the search result should set forth information matching the search criterion exactly or closely was a technical question that should be left to each enacting State. The prevailing view, however, was that article 22 should deal with, and provide guidance to States with respect to, both issues. The view was also expressed that only option A (dealing with exact matches) should be retained in article 22, while option B (dealing with close matches) should be left to the enacting State and discussed in the Guide to Enactment. It was stated that such an approach would be consistent with article 23, paragraph 1, of the draft Registry Act, which presupposed that the registry system would be designed to retrieve only information that matched the search criterion exactly. While the prevailing view was that article 22 should cover both exact and close matches, the discussion of the exact meaning of article 23, paragraph 1, was deferred until it had the opportunity to discuss article 23 (see para. 202 below).

201. After discussion, it was agreed that the reference to "close" matches in option B was not clear and should be clarified by reference to "criteria or a method to be specified by the enacting State". In addition, it was agreed that paragraph 3 should be revised to read along the following lines: "A written search result that purports to have been issued by the Registry is proof of its contents in the absence of evidence to the contrary". Moreover, it was agreed that the Guide to Enactment should explain the exact-match approach of option A and the close-match approach of option B, and discuss their advantages and disadvantages, referring also to the discussion of those matters in the Registry Guide (see the Registry Guide, paras. 205, 206 and 268-271). Subject to those changes, the Committee approved the substance of article 22 of the draft Registry Act.

Article 23 of the draft Registry Act: Registrant errors in required information

202. Diverging views were expressed as to whether paragraph 1 of article 23 of the draft Registry Act applied to registry systems with an exact-match or a close-match search programme. One view was that paragraph 1 was based on the premise that the registry system would have an exact-match search programme. As a result, it was stated, an error that might seem minor or trivial in the abstract might nonetheless mean that the registration would not be effective if the error would cause the information in the registry record not to be retrieved by a searcher using the grantor's correct identifier as the search criterion. It was also suggested that, to address the close-match approach, a new provision should be inserted in article 23 of the draft Registry Act along the following lines: "An error in the grantor identifier entered in

the notice does not render the registration of the notice ineffective, if the notice would be retrieved as a close match by a search of the registry record, unless the error would seriously mislead a reasonable searcher".

203. Another view was that paragraph 1 could practically apply only in the case of a close-match search programme. Thus, it was stated, a minor error in the grantor's identifier as provided in the notice would not render the notice ineffective if, under the registry's search programme, the notice would be retrieved as a close match on a search using the correct identifier. In addition, it was observed that modern registry search programmes were so designed as to typically result in not too long lists of notices matching the search criterion closely. Moreover, it was pointed out that, in any case, a close-match search programme should be publicized so that searchers would know how to conduct a search. It was also mentioned that, in an exact-match system, there would be no need to introduce a test or a rule as currently stated in paragraph 1, since, if any error was made in the grantor's identifier, the notice would not be retrieved by a searcher using the correct grantor identifier. After discussion, the Committee agreed that a new provision along the lines mentioned above (see para. 202 above) should be inserted within square brackets in article 23 of the draft Registry Act for further consideration of the matter.

204. Diverging views were expressed as to whether paragraph 2 should be retained. One view was that paragraph 2 should be deleted. It was stated that article 10 of the draft Registry Act was sufficient in providing that, if the encumbered assets were not described in the notice in a manner that would reasonably allow their identification, the notice would be ineffective. It was also observed that an error in the address of the grantor should be addressed in paragraph 1, and not in paragraph 2. The prevailing view, however, was that paragraph 2 should be retained. It was stated that paragraph 2 was intended to address situations in which, while the description of the encumbered assets was sufficient, an error was made that could render the notice ineffective. It was also noted that an error in the address of the grantor should be subject to the test in paragraph 2 and not to the same test as an error in the grantor identifier in paragraph 1, because, unlike the grantor identifier, the address of the grantor was not a search criterion. After discussion, the Committee agreed that paragraph 2 should be retained. It was also agreed that the Guide to Enactment should discuss the relationship of articles 10 and 23 of the draft Registry Act.

205. As to the order of paragraphs 1 to 4, it was agreed that paragraph 3, which dealt with an error in the grantor identifier, should follow paragraph 1, while paragraph 4, which dealt with an error in the description of the encumbered assets, should follow paragraph 2.

206. Diverging views were expressed as to whether paragraph 5 should be retained. One view was that paragraph 5 should be deleted. It was stated that the subjective test it referred to could create circular priority problems (A had priority over B, B had priority over C, C had priority over A). It was also observed that, if retained, to avoid that problem, paragraph 5 should include an objective test along the lines of the test in paragraph 2. The prevailing view, however, was that paragraph 5 should be retained. It was stated that, perhaps with the addition of a reference to "reasonable" reliance, paragraph 5 would be appropriate for policy reasons (those who unreasonably relied on the notice should not be protected) and practical reasons (it might not be too difficult to demonstrate that any alleged reliance was not reasonable). After discussion, the Committee agreed that paragraph 5 should be retained outside square brackets.

207. Subject to the above-mentioned changes, the Committee approved the substance of article 23 of the draft Registry Act.

Article 24 of the draft Registry Act: Post-registration change of grantor's identifier

208. The suggestion was made that articles 24 and 25 of the draft Registry Act should be moved to the third-party effectiveness or the priority chapter, as they dealt with third-party effectiveness and priority issues. That suggestion was objected to. It was

stated that those issues related to the registry system and it would be more logical and transparent to deal with those matters in the Registry Act. It was also pointed out that the enacting State would, in any case, have to decide whether to include the provisions of the Registry Act in their secured transactions law, another law or decree, or a combination thereof. It was also agreed that article 24 of the draft Registry Act should be revised to address the impact of the secured creditor's failure to register an amendment notice. Subject to some drafting changes, the Committee approved the substance of article 24 of the draft Registry Act.

Article 25 of the draft Registry Act: Post-registration transfer of an encumbered asset

209. It was agreed that, for the time being, all options should be retained in article 25 of the draft Registry Act and discussed in the Guide to Enactment. In addition, it was agreed that options A and B should be revised to address successive transfers of an encumbered asset and to clarify that they applied only to transfers of an encumbered asset in which the transferee did not acquire its rights free of the security right. Moreover, it was agreed that the relationship between article 25 of the draft Registry Act and article 42 of the draft Model Law should be further clarified. It was also agreed that, for article 25 of the draft Registry Act to apply to a transferee of an encumbered asset that would be treated as a new grantor, the definition of "grantor" in article 2 of the draft Model Law would need to be revised to include a transferee of an encumbered asset. Subject to those changes, the Committee approved the substance of article 25 of the draft Registry Act.

Article 26 of the draft Registry Act: Appointment of the registrar

210. The Committee approved the substance of article 26 of the draft Registry Act unchanged.

Article 27 of the draft Registry Act: Organization of information in registered notices

211. It was agreed that paragraph 1 of article 27 of the draft Registry Act should be aligned more closely with recommendation 15 of the Registry Guide. In addition, it was agreed that paragraph 2 should be revised to deal with the retrieval of notices that matched closely the search criterion and with global amendment notices. Moreover, it was agreed that the bracketed text in paragraph 3 should be clarified and retained outside square brackets. Subject to those changes, the Committee approved the substance of article 27 of the draft Registry Act.

Article 28 of the draft Registry Act: Integrity of information in the registry record

212. It was agreed that paragraph 2 of draft article 28 of the draft Registry Act should be revised to provide for a direct obligation of the Registry to preserve the registry record and to reconstruct it in the event of loss. It was also agreed that the Guide to Enactment should avoid referring to any particular technique used with respect to the preservation and reconstruction of records. Subject to those changes, the Committee approved the substance of article 28 of the draft Registry Act.

Article 29 of the draft Registry Act: Removal of information from the public registry record and archival

213. It was agreed that a second option should be inserted in paragraph 1 of article 29 of the draft Registry Act to accommodate the "open-drawer approach" (in which no information would be removed from the public registry record) taken in options C and D of article 20. It was also agreed that the Guide to Enactment should explain the various options. Subject to those changes, the Committee approved the substance of article 29 of the draft Registry Act.

2. Adoption of the report of the Committee of the Whole

214. At its 1023rd meeting, on 16 July 2015, the Commission adopted the report of the Committee of the Whole and agreed that it should form part of the present report (see section B.1 above). After considering article 26 of chapter IV (on the registry system) of the draft Model Law and articles 1 to 29 of the draft Registry Act, the Commission decided to approve their substance.

C. Possible future work in the area of security interests

215. The Commission recalled that, at its twenty-seventh session, Working Group VI had recommended to the Commission the preparation of the Guide to Enactment (A/CN.9/836, para. 121; see para. 167 above). In that connection, the Commission noted that, the Working Group, in preparing the draft Model Law, was mindful of the fact that the model law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering the model law for enactment. In addition, the Commission noted that, in the preparation of the draft Model Law, the Working Group had assumed that the model law would be accompanied by such a guide and referred a number of matters for clarification in that guide.

216. The Commission agreed that the Guide to Enactment should be prepared and referred that task to the Working Group. In addition, the Commission agreed that the Guide to Enactment: (a) should be as short as possible; (b) include cross-references to the Secured Transactions Guide and the other texts of the Commission on secured transactions; (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision or section of the model law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; (e) give guidance to States with respect to matters referred to them and in particular explain each option offered in various articles of the model law to assist enacting States in choosing one of the options offered. Moreover, the Commission agreed that, while the Guide to Enactment would have to be considered by the Working Group together with the draft Model Law to ensure consistency between the two texts, that consideration did not need to be as detailed as the consideration of the draft Model Law. Finally, the Commission requested the Working Group to expedite its work so as to submit the draft Model Law to the Commission for final consideration and adoption at its forty-ninth session in 2016.

217. The Commission also noted that, at its forty-third session, it had placed on its future work programme the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing.[29] After discussion, the Commission decided that those matters should be retained on its future work programme and considered at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting, to be held within existing resources.

D. Coordination and cooperation in the area of security interests

218. The Commission took note with appreciation of the report of the Secretariat about the progress achieved in: (a) the revision of the World Bank Insolvency and Creditor Rights Standard to take into account the key recommendations of the Secured Transactions Guide; (b) the coordination efforts with the European Commission with a view to ensuring a coordinated approach to the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the Assignment Convention, the Secured Transactions Guide and the draft Model Law; (c) the coordination efforts with Unidroit with respect to a fourth Protocol to the Convention on International Interests in Mobile Equipment on matters specific to

[29] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

agricultural, construction and mining equipment; and (d) the coordination efforts with the International Finance Corporation and the Organization of American States in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.

219. It was widely felt that such coordination and cooperation efforts were extremely important and should continue with a view to ensuring that the work of the Commission on security interests was reflected to the maximum extent possible in the relevant texts of other organizations. After discussion, the Commission renewed its mandate to the Secretariat to continue its coordination and cooperation efforts in the area of security interests.

V. Micro-, small- and medium-sized enterprises (MSMEs): progress report of Working Group I

220. The Commission recalled its decision at its forty-sixth session, in 2013,[30] which was reaffirmed at its forty-seventh session, in 2014,[31] granting to Working Group I the following mandate: "that work on international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies should be added to the work programme" and that "such work should start with a focus on the legal questions surrounding the simplification of incorporation."[32]

221. The Commission considered the reports of the Working Group on the work of its twenty-third session (A/CN.9/825), held in Vienna from 17 to 21 November 2014, and twenty-fourth session (A/CN.9/831), held in New York from 13 to 17 April 2015. The Commission commended the Secretariat for the working papers prepared for those sessions and for the reports of those sessions.

222. The Commission noted the work of the Working Group at its twenty-third session in respect of good practices in business registration (A/CN.9/WG.I/WP.85), as well presentations made to the Working Group by the following expert international organizations currently active in the area: the Corporate Registers Forum, the European Business Register and the European Commerce Register's Forum.[33] The Commission noted the continued development of the topic of good practices in business registration through a further exploration of the relevant key principles[34] and that the Working Group had not yet decided on the particular form that any legal text in this regard should take.

223. The Commission also noted the Working Group's consideration at its twenty-third and twenty-fourth sessions of the legal questions surrounding the simplification of incorporation,[35] observing that the deliberations were proceeding through a consideration of the relevant issues as outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, including A/CN.9/WG.I/WP.83, as well as through presentations by States of information on possible alternative legislative models to assist micro-, small- and medium-sized enterprises (MSMEs),[36] and on the text of a draft model law on a simplified business entity.[37] The Commission noted that the draft model law had been prepared as an example in order to assist the Working Group in its consideration of the issues necessary to make progress in its work, but that the Working Group had not yet decided on the form which any legal text on the issues surrounding the simplification of incorporation should take.

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[30] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.
[31] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.
[32] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.
[33] See A/CN.9/825, paras. 12-38.
[34] Ibid., paras. 39-46.
[35] Ibid., paras. 62-79 and A/CN.9/831, paras. 14-77.
[36] A/CN.9/825, paras. 56-61 and A/CN.9/WG.I/WP.87.
[37] See A/CN.9/WG.I/WP.89.

224. Some States expressed the view that the Working Group was working outside of its mandate. It was stated that two elements contained in the mandate should be considered as a priority: first, the starting point of the work should be simplified incorporation and second, should be the importance of the issue for developing countries. Other States expressed the view that the Working Group had done that, having considered simplified incorporation along with other approaches to reducing legal obstacles for MSMEs and that the Working Group should continue to do so. Another view was expressed that the Working Group had decided on the appropriate course of its deliberations within the mandate granted by the Commission, and that the Working Group could discuss several issues at the same time.

225. The Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission confirmed the mandate granted to Working Group I (see para. 220 above).

VI. Online dispute resolution: progress report of Working Group III

226. The Commission had before it the reports of the Working Group on the work of its thirtieth and thirty-first sessions (A/CN.9/827 and A/CN.9/833, respectively) and a proposal by Israel (A/CN.9/857) and a proposal by Colombia, Honduras and the United States (A/CN.9/858) related to the work of the Working Group. The Commission considered the reports of Working Group III and the proposals in conjunction with agenda item 18 (Work programme of the Commission) (see paras. 342-353 below).

VII. Electronic commerce: progress report of Working Group IV

227. The Commission recalled that at its forty-fourth session, in 2011, it had mandated Working Group IV (Electronic Commerce) to undertake work in the field of electronic transferable records.[38] The Commission also recalled that at that session it had welcomed the ongoing cooperation between the Secretariat and other organizations on legal issues relating to electronic single window facilities and had asked the Secretariat to contribute as appropriate, with a view to discussing relevant matters at the working group level when the progress of joint work offered a sufficient level of detail.[39]

228. At its current session, the Commission had before it the reports of the Working Group on the work of its fiftieth session (A/CN.9/828), held in Vienna from 10 to 14 November 2014, and fifty-first session (A/CN.9/834), held in New York from 18 to 22 May 2015. The Commission was informed that current work, which the Working Group decided should take the form of a draft model law on electronic transferable records (A/CN.9/834, para. 12), focused on domestic aspects of the use of electronic transferable records equivalent to paper-based transferable documents or instruments, and that international aspects of the use of those records, as well as the use of transferable records existing only in electronic form, would be addressed at a later stage. It was stated that the Working Group should limit its focus on electronic transferable records equivalent to paper-based transferable documents or instruments. It was added that the possibility of supporting the effective use of a model law on electronic transferable records by providing additional guidance for its implementation in the fields of carriage of goods and of financing might be considered at a later stage.

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[38] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[39] Ibid., para. 240.

229. The Commission was also informed about ongoing work in the field of paperless trade, including legal aspects of electronic single window facilities, carried out, in particular, in cooperation with the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP). It was said that that work could be useful with respect to implementation of article 10.4 of the Trade Facilitation Agreement adopted in 2014 by members of the World Trade Organisation.[40]

230. Reference was also made to the technical assistance and coordination activities undertaken by the Secretariat, including through the UNCITRAL Regional Centre for Asia and the Pacific (UNCITRAL-RCAP), in the field of electronic commerce.

231. Noting that the current work of the Working Group would greatly assist in promoting the use of electronic communications in international trade, the Commission expressed its appreciation to the Working Group for the progress made in preparing draft provisions on electronic transferable records and commended the Secretariat for its work. Bearing in mind that a model law on electronic transferable records would be accompanied by explanatory materials, the Commission encouraged the Working Group to finalize the current work in order to submit its results at the Commission's forty-ninth session.

VIII. Insolvency law: progress report of Working Group V

232. The Commission considered the reports of the Working Group on the work of its forty-sixth session (A/CN.9/829), held in Vienna from 15 to 19 December 2014, and forty-seventh session (A/CN.9/835), held in New York from 26 to 29 May 2015. The Commission commended the Secretariat for the working papers prepared for those sessions and for the reports of those sessions.

233. The Commission considered the progress made with respect to the three topics being developed in the Working Group: (a) facilitating the cross-border insolvency of multinational enterprise groups; (b) the obligations of directors of enterprise group companies in the period approaching insolvency; and (c) the recognition and enforcement of insolvency-related judgements.

234. With respect to the work on enterprise groups, the Commission noted that while progress might appear to be slow, discussion in the Working Group was focused on relatively new, very complex issues that had not been widely considered by the international community or resolved in national laws. For those reasons, it was suggested, work might need to be developed in stages to ensure broad understanding of the solutions being considered and to build consensus towards development of a text that would be widely acceptable and implemented. It was observed that if such a text could be achieved it would be a significant step in the development of cross-border insolvency law that could assist in maximizing value for creditors around the world.

235. On the second topic of the obligations of directors of enterprise group companies in the period approaching insolvency, the Commission noted that while the work was already well developed, it would not be referred to the Commission for finalization and approval until the work on enterprise group insolvency was sufficiently advanced to be able to ensure consistency of approach between the two texts.

236. The Commission welcomed the work on recognition and enforcement of insolvency-related judgement. It was noted that steps had been taken to facilitate close coordination with the Hague Conference on Private International Law so that progress on the Hague Conference's judgements project could be taken into consideration in the draft text being developed by the Working Group.

237. After discussion, the Commission commended the Working Group for its work on developing legal texts in the three areas noted above. The Commission noted that the Secretariat was continuing to monitor developments with respect to the insolvency of large and complex financial institutions and that a further note might be expected

[40] Available from www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

to outline the Financial Stability Board's response to its September 2014 consultative document on the cross-border recognition of resolution actions.

IX. Endorsement of texts of other organizations: Principles on Choice of Law in International Commercial Contracts

238. The Hague Conference on Private International Law requested the Commission to consider possible endorsement of the Principles on Choice of Law in International Commercial Contracts ("Hague Principles").[41]

239. It was noted that the main objective of the Hague Principles is to reinforce party autonomy and to ensure that the law chosen by the parties in international commercial transactions has the widest scope of application, subject to certain limits. In this context, the Commission noted that the Hague Principles, in article 3, allow parties to choose not only the law of a State but also "rules of law", within certain parameters and unless the law of the forum provides otherwise. The Commission noted with approval that that provision might facilitate the choice of UNCITRAL texts, such as the United Nations Sales Convention, where they would not otherwise apply, thus enhancing the harmonizing impact of those texts.

240. Taking note of the usefulness of the Hague Principles in facilitating international trade, the Commission, at its 1010th meeting, on 8 July 2015, adopted the following decision:

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

"*Expressing its appreciation* to the Hague Conference on Private International Law for transmitting to it the text of the Principles on Choice of Law in International Commercial Contracts ("Hague Principles"),

"*Taking note* that the Hague Principles complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods,[42] and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,[43]

"*Noting* that the preamble of the Hague Principles states that:

'1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions,

'2. They may be used as a model for national, regional, supranational or international instruments,

'3. They may be used to interpret, supplement and develop rules of private international law,

'4. They may be applied by courts and by arbitral tribunals,'

"*Congratulating* the Hague Conference on Private International Law on having made a valuable contribution to the facilitation of international trade by promoting the principle of party autonomy and reinforcing choice of law in international commercial contracts,

"*Commends* the use of the Hague Principles, as appropriate, by courts and by arbitral tribunals; as a model for national, regional, supranational or international instruments; and to interpret, supplement and develop rules of private international law."

[41] A/CN.9/847, and available from www.hcch.net.
[42] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.
[43] United Nations publication, Sales No. E.08.V.4.

X. Technical assistance to law reform

A. General discussion

241. The Commission had before it a note by the Secretariat (A/CN.9/837) describing technical cooperation and assistance activities. The Commission stressed the importance of such activities and expressed its appreciation for the related work undertaken by the Secretariat.

242. 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 costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors. The Commission also encouraged the Secretariat to seek cooperation and partnership with international organizations, including through regional offices, and bilateral assistance providers in the provision of technical assistance, and appealed to all States, international organizations and other interested entities to facilitate such cooperation and take any other initiative to maximize the use of relevant UNCITRAL standards in law reform.

243. The Commission welcomed the Secretariat's efforts to expand cooperation with the Government of the Republic of Korea on the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business project in the area of enforcing contracts, to other areas and with other APEC member economies. Support was expressed for the Secretariat's aim to cooperate more closely with APEC and its member economies to improve the business environment in the Asia-Pacific region and to promote UNCITRAL texts.

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

245. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to the Government of Austria and to the Commercial Finance Association for contributing to that trust fund since the Commission's forty-seventh session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

246. With regard to the dissemination of information on UNCITRAL's work and texts, the Commission noted the important role played by the UNCITRAL website (www.uncitral.org) and the UNCITRAL Law Library. The Commission expressed its

approval for the library's updated online public access catalogue, in particular with regards to the newly developed six-language interface.[44]

247. The Commission welcomed the inclusion on the UNCITRAL website of interactive status maps for the New York Convention,[45] the UNCITRAL Model Law on International Commercial Arbitration (1985),[46] and the United Nations Sales Convention.[47] The Commission also welcomed the establishment of new social media features, noting that the development of such features in accordance with the applicable guidelines was also welcomed by the General Assembly,[48] and noted with approval the "What's new at UNCITRAL?" Tumblr microblog. The Commission requested the Secretariat to continue to explore the development of new social media features on the UNCITRAL website as appropriate. Finally, recalling the General Assembly resolutions commending the website's six-language interface,[49] the Commission requested the Secretariat to continue to provide, via the website, UNCITRAL texts, publications, and related information, in a timely manner and in the six official languages of the United Nations.

B. Consideration of a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

248. The Commission had before it a note by the Secretariat (A/CN.9/845) containing a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms. Recalling its request to the Secretariat at its forty-third session, in 2010, 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 the United Nations Development Programme or other country offices of the United Nations,[50] the Commission considered which steps to take with respect to the draft.

249. Objection was raised by some delegations to formulating UNCITRAL's position with respect to the draft without discussing it in detail. A number of suggestions to improve its wording were made during the session. Some delegations expressed the view that the draft guidance note described some situations and suggested a course of work expected from States and therefore exceeded the framework of an internal note aimed at being applied by internal bodies of the United Nations in general and UNCITRAL in particular. Doubts were raised by some delegations about the appropriateness of the Commission acting on a document intended for the internal use of the United Nations Secretariat.

250. Other delegations considered it appropriate for the Commission to act on the document, which was intended to be widely used across the United Nations and expected to produce impact on States. They therefore welcomed its discussion in the Commission. The narrow scope and purpose of the intended document as a tool to increase awareness across the United Nations about the importance of sound commercial law reforms and the use of internationally accepted commercial law standards in that context was emphasized. While the Commission noted that the draft generally reflected that scope and fulfilled that purpose, it was suggested that renaming the document might help to better convey its intended narrow scope and

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[44] Available from https://unov.tind.io/.

[45] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention_status_map.html.

[46] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration/1985Model_arbitration_status_map.html.

[47] Available from www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status_map.html.

[48] General Assembly resolution 69/115, para. 21.

[49] General Assembly resolutions 61/32, para. 17; 62/64, para. 16; 63/120, para. 20; and 69/115, para. 21.

[50] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 336.

purpose. On the other hand, concerns were expressed about the content of the draft guidance note in relation to the UNCITRAL mandate.

251. After discussion, the Commission requested States to provide to its secretariat any suggestion for revision of the text and, in formulating such suggestions in writing, to keep in mind the intended scope and purpose of the document, which, to be usable by its expected readers, should remain short, concise and simple. It was agreed that the compilation of all comments received from States would be circulated by the Secretariat to all States together with a revised version of the text. It was understood that, if agreement of States on the revised text could be achieved before or during the consideration of the Commission's report in the Sixth Committee of the General Assembly in 2015, the Sixth Committee itself might wish to endorse the text, so as to avoid delay in issuing the document. Otherwise, the matter might need to be brought back to the Commission for consideration at its next session.

252. The Secretariat was requested, in revising the text, to follow closely the wording of General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL and avoid embarking into areas not directly linked to the UNCITRAL mandate. The Secretariat was also requested to allocate sufficient time for consideration of the revised text at the next session if the revised text had to be considered at that time, and to make provisions for specific time to be allotted to that item in the provisional agenda of that session.

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

253. The Commission considered document A/CN.9/840 "Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts", which provided information on the current status of the CLOUT system and of the digests of case law relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration.

254. The Commission expressed its continuing belief that CLOUT and digests were an important tool for promoting uniform interpretation of UNCITRAL texts and noted with appreciation the increasing number of UNCITRAL legal texts that were currently represented in CLOUT. As at 11 May 2015, 155 issues of compiled case-law abstracts had been prepared, dealing with 1,454 cases. The cases related to the following texts:

- The New York Convention
- Convention on the Limitation Period in the International Sale of Goods (New York, 1974)[51] and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)[52]
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[53]
- United Nations Sales Convention
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[54]
- United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)[55] ("Electronic Communications Convention")
- Model Law on Arbitration

[51] United Nations, *Treaty Series*, vol. 1511, No. 26119.
[52] Ibid., vol. 1511, No. 26121.
[53] Ibid., vol. 1695, No. 29215.
[54] Ibid., vol. 2169, No. 38030, p. 163.
[55] General Assembly resolution 60/21, annex.

- UNCITRAL Model Law on International Credit Transfers (1992)[56]

- UNCITRAL Model Law on Electronic Commerce, 1996[57]

- UNCITRAL Model Law on Cross-Border Insolvency (1997)[58]

- UNCITRAL Model Law on Electronic Signatures (2001)[59]

255. The Commission was informed that, while the majority of the abstracts published still originated from Western European and other States, there was a small increase in the number of abstracts from Eastern European States and from African States.

256. The Commission took note that new national correspondents had been appointed, including after document A/CN.9/840 (see para. 253 above) had been issued, and that the network of national correspondents was composed of 73 experts representing 35 countries. The Commission was also informed that since the note of the Secretariat to the forty-seventh session of the Commission in 2014 (A/CN.9/810), national correspondents had provided approximately 47 per cent of the abstracts published in CLOUT.

257. The Commission expressed its appreciation that the French version of the third edition of the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) had been translated and that the digest was now available in the six official languages of the United Nations on the UNCITRAL website as well as on CD-ROM. The latter format was considered to be particularly useful for technical assistance and coordination activities.

258. The Commission also commended the continued effort of its secretariat in the promotion of both the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) and the *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, and took note of the progress on the finalization of the digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency.

259. The Commission noted with appreciation the performance of the website www.newyorkconvention1958.org and the successful coordination between that website and the CLOUT system. It also welcomed the upgraded CLOUT database and noted with particular interest its improved features that resulted in a more user-friendly interface which allowed for faster as well as a more detailed search of material.

260. As in previous sessions, the Commission expressed its appreciation for the work of the Secretariat on CLOUT, once again noting the resource-intensive nature of the system and acknowledging the need for further resources to sustain it. The Commission thus appealed to all States to assist the Secretariat in its search for available funding at the national level to ensure sustained operation of the system.

XII. Status and promotion of UNCITRAL texts

261. 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.9/843). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its forty-seventh session.

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[56] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

[57] General Assembly resolution 51/162, annex.

[58] General Assembly resolution 52/158, annex.

[59] General Assembly resolution 56/80, annex.

262. The Commission also noted the following actions and legislative enactments made known to the Secretariat subsequent to the submission of the Secretariat's note:

(a) New York Convention — accession by Andorra (156 States parties);

(b) United Nations Sales Convention — withdrawal of declarations by Hungary (83 States parties);

(c) Electronic Communications Convention — ratification by Sri Lanka[60] (7 States parties);

(d) Mauritius Convention on Transparency — signature by Italy and ratification by Mauritius (1 State party);

(e) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 — enactment of the Model Law in Slovakia (2014) and enactment of the Model Law as amended in 2006 in Bahrain (2015) and Bhutan (2013);

(f) UNCITRAL Model Law on Electronic Commerce (1996) — enactment in Honduras (2015); and

(g) UNCITRAL Model Law on International Commercial Conciliation (2002) — enactment in Bhutan (2013).

263. The Commission noted with appreciation the inclusion in document A/CN.9/843 of certain information related to the status of the UNCITRAL Arbitration Rules[61] and the UNCITRAL Transparency Rules. The Commission requested the Secretariat to make this information available on the UNCITRAL website (www.uncitral.org) in the six official languages of the United Nations.

264. Considering the broader impact of UNCITRAL's texts, the Commission also took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/839) and noted with appreciation the increased influence of UNCITRAL legislative guides, practice guides and contractual texts. The Commission noted the importance of facilitating a comprehensive approach to the creation of the bibliography and the need to remain informed of activities of non-governmental organizations active in the field of international trade law. In this regard, the Commission requested non-governmental organizations invited to the Commission's annual session to donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review. The Commission expressed appreciation to the editors of the *International Journal of Arab Arbitration, IHR: International Commercial Law and Journal du droit international (Clunet)* for their donation of current and forthcoming issues of these journals.

XIII. Coordination and cooperation

A. General

265. The Commission had before it a note by the Secretariat (A/CN.9/838) providing information on the activities of international organizations active in the field of international trade law in which the Secretariat had participated since the last note to the Commission (A/CN.9/809). The Commission also had before it a note by the Secretariat (A/CN.9/851, paras. 6-13) providing information on developments in the field of sovereign debt restructuring, which had mentioned the work of the Commission in the fields of insolvency law and arbitration. The Commission

[60] Upon ratification, Sri Lanka declared: In accordance with articles 21 and 19 (para. 2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, the Convention shall not apply to electronic communications or transactions specifically excluded under Section 23 of the Electronic Transactions Act No. 19 of 2006, of Sri Lanka.

[61] UNCITRAL Arbitration Rules (as revised in 2010), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I; UNCITRAL Arbitration Rules (1976), ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

expressed appreciation for the Secretariat engaging with a high number of organizations both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following organizations: UNCTAD, the United Nations Economic Commission for Europe, the United Nations Environment Programme, the United Nations Inter-Agency Cluster on Trade and Productive Capacity, the World Bank, the World Trade Organization, APEC, the Hague Conference on Private International Law, OECD and Unidroit.

266. By way of example of current efforts, the Commission took note with satisfaction of the coordination activities involving the Hague Conference on Private International Law and Unidroit as well as the activities on the rule of law in those areas of work of the United Nations and other entities that were of relevance for the work of UNCITRAL.

267. The Commission also noted that the Secretariat participated in expert groups, working groups and plenary meetings with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products. The Commission further observed that coordination work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of such 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.

B. Coordination and cooperation in the field of international arbitration and conciliation

268. The Commission noted with appreciation the ongoing cooperation and coordination efforts of the Secretariat with organizations active in the field of international arbitration and conciliation. The Commission further noted that UNCITRAL standards in that field were characterized by their flexibility and generic application to different types of arbitration, including both purely commercial arbitration and investor-State arbitration. In that light, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reforms had been formulated by a number of organizations. In that context, the Commission was further informed that the Secretariat was conducting a study on whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Center for International Dispute Settlement (CIDS) of the University of Geneva and the Graduate Institute of International and Development Studies. In that light, the Secretariat was requested to report to the Commission at a future session with an update on that matter. In addition, the Commission took note of the statements made by the following intergovernmental organizations.

1. UNCTAD

269. The representative of UNCTAD mentioned that the UNCITRAL Transparency Rules and the Mauritius Convention on Transparency constituted an important contribution to the comprehensive reform of the international investment agreements (IIA) regime and reported on the main activities of UNCTAD in the field of IIAs and investor-State dispute settlement, which included research and analysis, technical assistance and intergovernmental consensus building. The Commission was informed that UNCTAD had devoted an extensive part of its work developing potential solutions to the challenges that the IIA regime was currently facing. The World Investment Report published by UNCTAD in 2015 offered an action menu for IIA reforms, building on views that emerged at recent intergovernmental and multi-stakeholder meetings organized by UNCTAD as well as its earlier work in that

area, and based on the guiding principle that sustainable development should be the overall objective of IIA reforms.

270. The Commission was informed that the 2015 World Investment Report offered policy options for IIA reforms in key areas (such as IIA clauses, investment dispute settlement and systemic issues) and at different levels of policymaking (national, bilateral, regional and multilateral levels). Options for reform included reforming the mechanism of investment arbitration under the current structure or replacing it; the latter could include the creation of a standing international investment court, reliance on State-State dispute settlement, and/or reliance on domestic judicial systems of the host State.

2. ICSID

271. The Secretary-General of ICSID provided a general outline of ICSID's activities in the field of investor-State arbitration. It was stated that ICSID had administered approximately 70 per cent of all known investment cases under the ICSID rules, the UNCITRAL Arbitration Rules and ad hoc, and that its caseload had increased in recent years, having registered 52 cases in the past fiscal year. The Commission was informed of the efforts by ICSID to provide cost- and time-efficient services by making use of the World Bank offices around the world, developing best practices and making better use of technology, while ensuring that due process and the equality of the parties were respected. The Commission also took note of the technical assistance and knowledge management activities of ICSID to provide information about investor-State dispute settlement through its new website and publications as well as by conducting training sessions. With respect to reform initiatives in the field of investor-State arbitration, it was highlighted that States were the primary custodians of such initiatives in their investment treaties and contracts, and that ICSID would continue to contribute its expertise and experience to implement those initiatives by working closely with its member States, the Commission and other organizations.

3. PCA

272. The representative of PCA informed the Commission of the activities of PCA, particularly under the UNCITRAL Arbitration Rules. It was mentioned that PCA had administered over 110 investor-State arbitrations, the great majority of which were conducted pursuant to the UNCITRAL Arbitration Rules. The Commission also took note of PCA's role as designating and appointing authority in connection with the UNCITRAL Arbitration Rules, where a significant proportion of requests received by PCA concerned challenges to arbitrators. It further took note of the transparent proceedings administered by PCA and possible cooperation in reform efforts in the field of investor-State dispute settlement.

4. OECD

273. The representative of OECD informed the Commission of its recent initiatives, which might be of particular interest to the Commission. Firstly, the Commission was informed that OECD hosted an intergovernmental forum, called the Freedom of Investment Roundtable (the "Roundtable"), which had been engaged in work on investor-State arbitration and investment law since 2011. It was noted that the Roundtable, which was attended by a wide range of States in addition to the members of the OECD, had demonstrated the value of exchanges of experience and best practices relating to investment treaties. In addition, the Commission was informed that OECD held this year its third Global Forum on Responsible Business Conduct and that OECD's work on responsible business conduct built on the OECD Guidelines for Multinational Enterprises and its mechanisms for implementation. It was also noted that the OECD Policy Framework for Investment (PFI) had recently been updated, which addressed numerous policy areas (including investment policy, investment promotion and facilitation, investment in support of green growth as well as policies on competition, trade and taxation), all of which contributed to the investment climate. It was stated that such an integrated approach could help

governments in improving the investment climate and achieving other public policy goals.

5. Energy Charter Secretariat

274. The representative of the Energy Charter Secretariat informed the Commission about the secretariat's role in the implementation of the Energy Charter Treaty, the only existing multilateral investment treaty among 54 States providing investment arbitration as a tool for the protection of energy investments. It was mentioned that at the occasion of the Ministerial Conference on the International Energy Charter at The Hague on 20-21 May 2015, the importance of full access to adequate dispute settlement, including national mechanisms and international arbitration, was restated. Particular attention was drawn to the activity by the Investment Group of the Energy Charter Conference, in close cooperation with UNCITRAL, ICSID, PCA, International Chamber of Commerce (ICC) and SCC and with the assistance of IMI, for the implementation of article 26 of the Energy Charter Treaty, allowing mediation of energy investment disputes and to remove obstacles to mediation.

C. Reports of other international organizations

275. The Commission took note of statements made on behalf of the following international intergovernmental and non-governmental organizations: Unidroit, Hague Conference on Private International Law and ICANN, a summary of which is reported below.

1. Unidroit

276. The Secretary-General of Unidroit reported on the main activities of Unidroit since the forty-seventh session of UNCITRAL, in 2014. The Commission was in particular informed about the following:

(a) **Completion of the Legal Guide on Contract Farming**, authored in collaboration with the Food and Agriculture Organization of the United Nations (FAO), and the International Fund for Agricultural Development (IFAD). The Legal Guide intends to raise awareness on the legal dimension of contract farming and enhance fair and economically beneficial relationships between agricultural producers and contractors. The text is also intended to serve as a "good practice" reference by providing guidance for parties engaged in contract farming operations, and for policymakers in the context of the formulation of public governance instruments to sustain agricultural development. Appreciation was expressed to UNCITRAL for providing comments on the Guide during its preparation. It was noted that the Guide, approved by the Unidroit Governing Council in May 2015, would be launched at an event in Rome on 28 July 2015 and that IFAD had granted funds to support various follow-up activities planned by FAO, under the supervision of a steering committee in which the three organizations participate;

(b) **The Convention on International Interests in Mobile Equipment**[62] **("Cape Town Convention")** continued to attract new accessions and had reached the number of sixty-six contracting States. Participation in the Aircraft Protocol to the Convention had increased as well and currently the Protocol had fifty-eight States parties. There were also developments with regard to protocols to the Cape Town Convention. Since the last Commission session, in 2014, the European Union had approved the Rail Protocol, this approval would be instrumental to ratification of this text by States and its entry into force; a third session of the Space Protocol Preparatory Commission had been held and had largely finalized the draft Regulations for the international registry; significant progress had also been made on the future fourth Protocol on matters specific to agricultural, mining and construction equipment, for which Study Group meetings had been held. The development of such Protocol continued and it was anticipated that it would move to the intergovernmental

[62] Available from www.unidroit.org/instruments/security-interests/cape-town-convention.

negotiation stage in 2016. Unidroit's appreciation for UNCITRAL's involvement in developing the Protocol was expressed and it was noted that the UNCITRAL secretariat had attended the first Study Group meeting;

(c) Unidroit continued to be active in the field of international commercial contracts and had created a restricted Working Group to consider developing possible amendments and additions to the black-letter rules and comments of the current edition of **the Principles of International Commercial Contracts** in order to address the special needs of long-term contracts. The Working Group, whose first meeting was attended by the UNCITRAL secretariat, considered amendments relating to contracts with open terms, agreements to negotiate in good faith, supervening events, termination for compelling reasons and post-contractual obligations. The second meeting to finalize the proposed amendments and additions to the black-letter rules was expected to be held in October 2015;

(d) Unidroit also continued to work with ELI to adapt the American Law Institute (ALI)/Unidroit **Principles of Transnational Civil Procedure (2004)** to the specificities of European regional legal cultures with a view to drafting Europe-specific regional rules. Five Working Groups had been established to consider (i) access to information and evidence; (ii) provisional and protective measures; (iii) service of documents and due notice of proceedings; (iv) *lis pendens* and *res judicata*; and (v) obligations of the parties and lawyers. The Working Groups first met in November 2014 in a joint meeting with the Steering Committee and a second meeting of the Steering Committee and Chairs of the Working Groups was subsequently held in Brussels in April 2015. It was expected that work on this topic could be completed in three to four years;

(e) Celebrations of the twentieth anniversary of the **1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects** took place in Rome (8 May 2015) and provided an opportunity to assess the significance, the distinctive features and operational aspects of this normative instrument;

(f) As the year 2016 will mark **Unidroit's ninetieth anniversary**, Unidroit was planning a one-day high-level special session of the Unidroit General Assembly, tentatively scheduled for 20 April 2016, to discuss the role and place of private law in supporting the implementation of the international community's broader cooperation and development objectives. UNCITRAL was invited to be represented at the highest level at such an event and to chair a panel devoted to commercial law and the rule of law to highlight the important contribution of the Commission in this field.

2. The Hague Conference on Private International Law

277. A representative of the Permanent Bureau expressed appreciation for the continuing cooperation between The Hague Conference, Unidroit and UNCITRAL. It was noted that, in the context of such cooperation, The Hague Conference had on various occasions shared its expertise in projects of private international law of common interest to the three organizations, and that it was ready to further contribute to other similar projects in the future.

3. ICANN

278. The Commission was informed about the mandate and the work of ICANN. A not-for-profit corporation, established under the laws of California (United States), ICANN deals with Internet security, stability and interoperability. In particular, the organization is responsible for the coordination of the Internet's naming system, i.e. the Domain Name System, through which ICANN contributes to maintain an open and interoperable Internet. Appreciation was expressed for ICANN's participation, as an observer, in the work of UNCITRAL Working Group IV (Electronic Commerce).

D. International governmental and non-governmental organizations invited to sessions of UNCITRAL

279. At its current session, the Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work.[63] In paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL had long-standing cooperation and which had been invited to sessions of the Commission. The Commission also recalled that, further to its request,[64] the Secretariat had adjusted the online presentation of information concerning intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups and the modality of communicating such information to States, and the adjustments made were to the satisfaction of the Commission.[65]

280. The Commission took note that since its forty-seventh session, in 2014, the following organizations had been added in the list of non-governmental organizations invited to sessions of UNCITRAL: the Brazilian Chamber of Electronic Commerce (www.camara-e.net); the Center of Arbitration of the Chamber of Commerce of Lima (www.camaralima.org.pe); International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (www.ucci.org.ua/arb/icac/en/icac.html) (ICAC); IFG (www.ifgroup.com); and the New York International Arbitration Center (nyiac.org) (NYIAC). The Commission requested the Secretariat, when presenting its oral report at future sessions of the Commission on the topic of organizations invited to sessions of UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite non-governmental organizations.

281. The Commission also took note that, pursuant to General Assembly resolutions 68/106 and 69/115 (paragraph 8 in both resolutions), all States and invited organizations were reminded, when they were invited to UNCITRAL sessions, about rules of procedure and work methods of UNCITRAL. Such a reminder is effectuated by inclusion in invitations issued to them of a reference to a dedicated web page of the UNCITRAL website where main official documents of UNCITRAL pertaining to its rules of procedure and work methods could be easily accessed. (For the deliberations of the Commission on coordination and cooperation in the area of security interests, see paras. 218-219 above.)

XIV. UNCITRAL regional presence

282. The Commission had before it a note by the Secretariat (A/CN.9/842) on the activities undertaken by UNCITRAL-RCAP.

283. In an oral report by the head of UNCITRAL-RCAP, reference was made to the close cooperation with the host country of UNCITRAL-RCAP, the Republic of Korea, and in particular its Ministry of Justice, namely by the joint organization of several regional conferences and technical assistance initiatives, such as the 2015 UNCITRAL Asia-Pacific Incheon Spring Conferences and the third ADR Asia-Pacific Conference.

284. Strong support was expressed, in particular, for the various activities undertaken by UNCITRAL-RCAP which aimed at long-term capacity-building ensuring legal uniformity and general economic stability in Asia and the Pacific, in close cooperation and coordination with institutions active in trade law reform in the region.

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[63] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex III.

[64] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 288-298.

[65] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 176-178.

285. It was recognized that the growing relevance of UNCITRAL-RCAP and its innovative approaches promoted the harmonization and modernization of international trade law standards in the context of economic integration and cooperation frameworks, and actions undertaken in the context of regional organizations, in particular the ASEAN Economic Community, APEC, the Gulf Cooperation Council and the South Asian Association for Regional Cooperation, were encouraged.

286. The Commission reiterated the importance of the mandate given to UNCITRAL-RCAP and expressed firm encouragement and support for its wide range of activities, namely the educational and outreach programmes, emphasizing its growing significance in increasing regional contributions to the work of UNCITRAL.

287. In response to a suggestion to hold a session of a working group in the Asia-Pacific region, the Secretariat was requested to assess such feasibility taking into account the budget situation and the long tradition of holding those sessions in Vienna and New York.

288. The proposal to host a celebratory event in the Asia-Pacific region on the occasion of the 50th anniversary of the establishment of UNCITRAL was supported.

289. The Commission acknowledged with gratitude the financial and in-kind contributions of the Government of the Republic of Korea to the operation of UNCITRAL-RCAP and to its specific activities, as well as that of other contributors.

290. The Government of the Republic of Korea stated its continued willingness to support the operation of UNCITRAL-RCAP, possibly by extending its financial contribution beyond 2017. Furthermore, in that context, a suggestion was made that it would be desirable for UNCITRAL-RCAP to become a permanent regional office through assistance from States in the region and possibly through the United Nations regular budget.

291. The Commission reiterated that, in light of the importance of a regional presence for raising awareness of UNCITRAL's work and, especially, for promoting the adoption and uniform interpretation of UNCITRAL texts, and in view of the successful activities of UNCITRAL-RCAP, further efforts should be made to emulate its example in other regions. The Secretariat was requested to pursue consultations regarding the possible establishment of other UNCITRAL regional centres and/or capacity-building centres.

292. In that context, while concern was raised on the already limited resources of the UNCITRAL secretariat to monitor and support regional activities, a balanced approach was encouraged to ensure that benefits resulting from the establishment of additional regional centres outweigh any related cost associated with time spent by the UNCITRAL secretariat, recognizing that such centres are beneficial to all States and for the efficient global implementation of UNCITRAL standards.

293. The Commission was informed of the specific offer received to establish a UNCITRAL regional centre in Colombia, which gathered support from States.

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

A. Introduction

294. The Commission recalled that the item on the role of UNCITRAL in promoting the rule of law at the national and international levels had been on the agenda of the Commission since its forty-first session, in 2008,[66] in response to the General Assembly's invitation to the Commission to comment, in its report to the General

[66] For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, paras. 111-113.

Assembly, on the Commission's current role in promoting the rule of law.[67] The Commission further recalled that since that session, the Commission, in its annual reports to the General Assembly, had transmitted comments on its role in promoting the rule of law at the national and international levels, including in the context of post-conflict reconstruction. It expressed 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.[68] That view had been endorsed by the General Assembly.[69]

295. At its forty-eighth session, the Commission heard an oral report by the Secretariat on the implementation of the relevant decisions taken by the Commission at its forty-seventh session.[70] A summary of the report and decisions of the Commission related thereto are contained in section B below.

296. The Commission took note of General Assembly resolution 69/123 on the rule of law at the national and international levels, by paragraph 17 of which the General Assembly invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. The Commission decided to focus its comments to the General Assembly this year on the role of its multilateral treaty processes in promoting and advancing the rule of law in line with paragraph 20 of that resolution. The comments were formulated following a panel discussion with participation of invited experts. The comments and a summary of the panel discussion are contained in section C below.

297. The Commission also took note of paragraphs 1 and 15 of that resolution and the Secretary-General report A/68/213/Add.1 in which the Secretary-General expressed the view that a closer interaction between the General Assembly and UNCITRAL should be explored in developing the linkages between the rule of law and the three pillars of the United Nations: peace and security, human rights and development. The Commission noted its relevance to that discussion and endorsed Secretariat efforts towards reflecting UNCITRAL's views in the analytical summary to be prepared under paragraph 15 of the resolution.

B. Implementation of the relevant decisions taken by the Commission at its forty-seventh session

298. On behalf of the Chairman of UNCITRAL's forty-seventh session, it was reported that efforts had been made to reflect in negotiations of the post-2015 development agenda and in an outcome document of the Third International Conference on Financing for Development to be held in Addis Ababa on 13-16 July 2015 the importance of harmonized and modernized international commercial law framework for implementation of the post-2015 development agenda. A paragraph acknowledging the relevance of UNCITRAL's work in the financing for development context was proposed for inclusion in the outcome document of the Conference and was supported by a number of States. The Commission welcomed the proposal and expressed the hope that it would be retained in the final outcome document.

299. The Commission noted developments related to the United Nations rule of law agenda since its forty-seventh session, in particular the integration of rule of law as a

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[67] General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; and 68/116, para. 14.

[68] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 413-419; ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313-336; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 299-321; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 195-227; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 267-291; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 215-240.

[69] Resolutions 63/120, para. 11; 64/111, para. 14; 65/21, paras. 12-14; 66/94, paras. 15-17; 67/89, paras. 16-18; 68/106, para. 12; and 69/115, para. 12.

[70] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 228.

target in the post-2015 development agenda, the relevance of UNCITRAL's work to a number of other envisaged targets in the post-2015 development agenda and ongoing work on indicators that would accompany sustainable development goals and targets to be adopted in September 2015.

300. The Commission expressed its appreciation to the Chair of the forty-seventh session of UNCITRAL, Mr. Choong-hee HAHN (Republic of Korea), for his significant efforts towards increasing awareness of UNCITRAL's work across the United Nations system and for bringing issues of harmonization and modernization of the law of international trade to the discussions of the post-2015 development agenda and financing for development. It requested States members of UNCITRAL, its Bureau at the current session and its secretariat to take appropriate steps to ensure that the positive developments related to UNCITRAL are retained and if possible reinforced, in subsequent stages of negotiation, adoption and implementation of the post-2015 development agenda, in particular in the outcome documents of the Addis Ababa Conference and the 2015 Summit and in the indicators that would accompany the sustainable development goals and targets.

301. The Commission recalled its call to its secretariat to continue exploring synergies and expanding outreach to delegations of States to various United Nations bodies with the view of increasing their awareness of the work of UNCITRAL and its relevance to other areas of work of the United Nations.[71] Support was expressed for outreach to various bodies of the United Nations system operating at a country level with the mandate to assist with local law reforms, be it in the promotion of the rule of law, development or other context, so that they appropriately factor in their work the promotion of the rule of law in commercial relations generally and UNCITRAL standards in particular.

C. UNCITRAL comments to the General Assembly

1. Summary of the panel discussion on the role of UNCITRAL multilateral treaty processes in promoting and advancing the rule of law

302. Speakers referred to General Assembly resolution 67/1 that recognized the role of UNCITRAL and the law of international trade in the rule of law and development contexts. They felt that more should be done to achieve the understanding of the United Nations rule of law activities as also encompassing promotion of rule-based commercial relations.

303. According to speakers, more should also be done towards increasing awareness across the United Nations system about relevance of the work of UNCITRAL to the implementation of the international development agenda. In particular, aspects of international trade facilitation discussed across the United Nations system and beyond should not overlook the need for removing or reducing legal obstacles to the flow of international trade. Outreach should be to the entire spectrum of United Nations bodies relevant to the work of UNCITRAL, including specialized agencies.

304. On the role of UNCITRAL multilateral treaty processes in promoting and advancing the rule of law, the invited speakers focused on: (a) initiation of a treaty process; (b) treaty-making processes; and (c) treaty implementation. They discussed the linkages among those three stages of multilateral treaty processes and the impact of each separately and all cumulatively on the quality of a treaty, its acceptance by States and intended end-users, and the promotion of the rule of law in commercial relations.

305. The need for close coordination with all relevant stakeholders at all stages of multilateral treaty processes was emphasized in order to avoid duplication, conflicting results and lost opportunities to advance the rule of law through the process. Suggestions were made for increasing cooperation and coordination in particular with regional bodies.

[71] Ibid., para. 284.

306. The technical and apolitical nature of the law of international trade (i.e. law regulating commercial relations between private parties as opposed to trade relations among States) was cited among factors that facilitated UNCITRAL's standard-setting activities. Linking UNCITRAL's treaty-making processes too closely to multilateral trade agreement processes should be discouraged since the latter processes often led to political compromises that had little to do with the assessment of economic and contract practice effects of standards being prepared.

307. Different types of United Nations treaties emanated from the work of UNCITRAL were recalled. Some treaties harmonized existing legal systems (e.g. the United Nations Sales Convention) while others recorded an agreement on economic results-based rules (e.g. the Assignment Convention). Some UNCITRAL instruments combined both elements — harmonization of developed legal regimes on some aspects and economic results-based approaches prevailing only in a minority of jurisdictions on some other aspects.

308. The positive economic and rule of law effect of all treaties, including those allowing declarations by States and derogations by private parties, was emphasized. It was argued that certainty and predictability were still ensured through treaties allowing declarations since the extent of modification through the declaration was known to commercial parties in advance. Treaties with party autonomy provisions, even though they might not be applicable to particular transactions, still promote "best practice" rules, avoiding unnecessary regulation.

309. In the context of **initiation of a treaty-making process in UNCITRAL**, during the panel discussion and ensuing discussion, the importance of the timely selection of the appropriate subject for regulation by a treaty was emphasized. Means of achieving that, in particular through closer collaboration with development banks, other development assistance agencies and business communities, were discussed. From African development perspectives, the following areas for possible work by UNCITRAL were highlighted in particular: regulation of transit carriers; enforcement of judgements; insolvency of natural persons; franchising; technology transfer; distribution and agency contracts; and natural resources exploitation. The need for further harmonization work in areas already tackled by UNCITRAL or currently being tackled — public procurement, construction contracts, infrastructure projects, international payments and electronic commerce — was also highlighted.

310. Citing specific examples, speakers noted that choosing between a treaty and other types of instruments (a model law or legislative guide) was not always a straightforward choice and the final choice might be made when a standard was already being elaborated. Identifying at the very early stage the primary beneficiaries of a standard was necessary in order to ensure the correct approach to regulation. The impact of that initial stage of the treaty process on the subsequent fate of the treaty was underscored. There were examples in UNCITRAL's practice proving the effectiveness of a "soft law" approach at the initial stages of harmonization: the widespread use of "soft law" standards made achieving a higher-level of unification through a treaty more realistic and the treaty elaborated in the end was more easily implemented.

311. In the context of **treaty-making processes**, speakers discussed work methods of UNCITRAL aimed at inclusiveness, publicity and reconciling various views and interests of negotiating parties. By bringing together experts from Governments, private sector and other institutions, UNCITRAL promoted a dialogue across nations, cultures and interests. That dialogue was not always easy taking into account differences in local regulation of private law matters addressed by UNCITRAL, legal traditions and level of development of countries; solutions thus by necessity were based on compromises.

312. The understanding in UNCITRAL of consensus as a "substantially prevailing majority", practices of reaching it and the active role of invited non-governmental organizations in negotiation were cited as features making UNCITRAL's standard-making processes distinct from those of other United Nations bodies and contributing to the quality of its standards. The effectiveness of UNCITRAL's treaty-making

processes is recognized by the well-established practice of the General Assembly to adopt conventions prepared by UNCITRAL by consensus rather than sending them for finalization and adoption by diplomatic conferences.

313. In the context of **treaty implementation**, speakers noted that the quality of treaty-initiation and treaty-making processes and of a treaty itself did not guarantee the adoption of the treaty by the international community. Reasons were various, including that solutions in the treaty became outdated or came in conflict with regional economic integration commitments. The capacity to properly implement a treaty (existence of the required institutions, procedures and professional cadre) was also an issue for many countries.

314. On the other hand, informal ways of treaty implementation were also becoming widespread: treaty provisions were being used by commercial parties as contractual clauses or incorporated by various rule-formulating or law reform assistance agencies in "soft law" instruments (e.g. regional model laws or guidance documents). There were also examples when courts, in the absence of adequate national regulation of questions covered by a treaty, applied the treaty, by this improving conditions for trade on the territory of the State. There were also examples when a treaty had influenced model norms at the regional level and was transposed to national systems in full or in part through a regional harmonization instrument.

315. Speakers highlighted the importance for effective implementation of treaties of achieving their uniform interpretation and application. The role of CLOUT and digests was important in that respect since they assisted courts to achieve autonomous interpretation of UNCITRAL standards with due regard to their international character and avoiding influence of national approaches. National approaches might be inadequate, especially in countries without well-established jurisprudence on commercial law matters. The UNCITRAL secretariat was encouraged to continue its efforts towards promoting uniform interpretation and application of UNCITRAL standards and support of such efforts by various stakeholders was welcomed.

316. In addition, the continuing efforts of the UNCITRAL secretariat to provide technical assistance to States with their commercial law reforms despite its limited resources were praised. The need for outreach to a wide range of possible partners to expand that work and at the same time to address the issue with the shortage of resources was highlighted. Desirability of establishing a dedicated international body responsible for promoting, enacting, monitoring and implementing UNCITRAL treaties and various ways to build and sustain it were discussed. All those efforts could in no way undermine the active role of States and relevant intergovernmental and non-governmental organizations in promoting, enacting, monitoring and implementing UNCITRAL treaties.

317. Finally, the idea of a uniform code of international trade law that was discussed in the early years of UNCITRAL was recalled. Doubts were expressed that concerns that led to abandoning at that time the idea of preparing such a code by UNCITRAL disappeared. It was nevertheless not excluded that at some point in future all internationally accepted standards in the area of the law of international trade might need to be consolidated to ensure the proper interlinkage and coherence among them, and UNCITRAL might consider taking some preliminary steps towards that end, for example preparing a concept note for a future code.

2. Comments by the Commission

318. The Commission expressed its appreciation to the panellists for their statements and noted that their statements reinforced the conviction expressed by the General Assembly and the Commission 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.

319. In the particular context of the role of its multilateral treaty processes in promoting and advancing the rule of law, the Commission recalled its mandate to further the progressive harmonization and unification of the law of international trade

in particular by (a) preparing international conventions in the field of the law of international trade, (b) promoting the codification and wider acceptance of international trade terms, provisions, customs and practices in collaboration, where appropriate, with other organizations operating in the field, (c) promoting wider participation in them, and (d) promoting ways and means of ensuring their uniform interpretation and application.

320. The Commission recalled that most treaties developed through its work had been adopted by the General Assembly. It was noted that the inclusive, transparent and consensus-based standard-making processes in UNCITRAL support the value and importance of UNCITRAL as a body devoted to harmonization and unification of the law of international trade, and promote international acceptance of its work.

321. The Commission identified important features of the field in which it operated: (a) flexibility (because party autonomy was the general norm); (b) dynamism (because business practices evolved rapidly and with that the need to adjust their regulation); and (c) influence by different legal systems and *lex mercatoria*. These features explain UNCITRAL's considered approach to initiating any standard-setting activity and drafting techniques aimed at reconciling interests of various stakeholders in a balanced and neutral way. For example, if a high degree of harmonization could not be achieved, or a greater degree of flexibility was desired and was appropriate to the subject under consideration, a technique of harmonization other than a treaty, such as a model law or legislative guide, was used.

322. During forty-eight years of UNCITRAL's work, the Commission formulated ten multilateral treaties, five of which have entered into force. The number of States parties to UNCITRAL conventions that entered into force is within the range of six to thirty-four, the exception being the United Nations Sales Convention with eighty-three State parties. The most recent treaty prepared by UNCITRAL is the Mauritius Convention on Transparency, adopted on 10 December 2014, which provided for the retrospective application of the UNCITRAL Transparency Rules. UNCITRAL's treaties and other instruments seek to balance the interests of States and commercial parties. In addition to numerous UNCITRAL model laws, rules and guides, they established international standards for the practice in the areas that they addressed.

323. The Commission noted that it was also a custodian of the New York Convention, a treaty with 156 State parties as of today. The Convention embodies a set of criteria and an agreed procedure by which arbitration agreements and awards are to be recognized and enforced in the courts of all States parties, thereby lending certainty and predictability to the regime of international commercial arbitration. By making the regime of commercial arbitration essentially global in scope, the New York Convention makes a substantial contribution to advancing and promoting access to justice in the resolution of commercial disputes (access to justice being another important component of the rule of law). The Commission monitors the effective implementation of that Convention and promotes its uniform interpretation and application. The Commission recalled that UNCITRAL projects related to that Convention, including the adoption by UNCITRAL at its thirty-ninth session, in 2006, of a recommendation regarding the interpretation of some provisions of the New York Convention and the preparation of the UNCITRAL Secretariat Guide on the New York Convention, were noted with appreciation by the General Assembly.[72]

324. The Commission brought to the attention of the General Assembly issues related to its treaty processes requiring attention:

(a) The need to achieve increased participation of all countries in UNCITRAL's rule-formulating work in order to encourage acceptance of that work. The local capacity of States from various regions, legal systems and different levels of development, including least-developed countries and small-island developing countries, to fully engage in debate and negotiation in UNCITRAL should be enhanced. Increased participation in UNCITRAL's rule-formulating work contributes

[72] General Assembly resolutions 61/33, para. 2, and 69/115, para. 5.

to building such capacity and to the local capacity to implement sound commercial law reforms;

(b) The need to further develop coordination mechanisms among the various rule-formulating bodies in the field of the law of international trade at the international and regional levels. Mechanisms to achieve closer coordination in particular with regional economic integration organizations would be welcome. The role of UNCITRAL-RCAP and other possible regional offices of UNCITRAL was underscored in that context;

(c) The need to achieve greater representation in the work of UNCITRAL of professional associations, arbitral institutions and other end users from underrepresented regions and groups of countries. Contributions of intended end users of UNCITRAL standards were considered valuable in defining UNCITRAL's work programme and in elaborating, promoting and monitoring the effectiveness of its standards;

(d) The need to increase the participation of States in development, implementation and application of treaties.

XVI. The thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

325. The Commission had before it a note by the Secretariat entitled "Current trends in the field of international sale of goods law" (A/CN.9/849). The Commission recalled that at its forty-sixth session, in 2013, it had requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the United Nations Sales Convention, to take place on a date after the forty-seventh Commission session.[73] In accordance with that request, which was reiterated at the Commission's forty-seventh session,[74] a panel discussion was organized by the Secretariat with participation of the following experts in the field of international sale of goods law: Mr. János Martonyi (moderator), Mr. Quentin Loh, Mr. Rui Manuel Gens de Moura Ramos, Ms. Ana Elizabeth Villalta Vizcarra, Mr. Liming Wang (panel members). A short summary of their presentations is contained in paragraphs 326 to 332 below.

326. It was recalled that a conference to take stock of progress in the promotion and implementation of the United Nations Sales Convention had taken place in Vienna on the occasion of the twenty-fifth anniversary of the Convention, in 2005. It was noted that the United Nations Sales Convention had continued to gather new State parties in the last decade, albeit a further increase in the pattern of adoptions could be desirable. At a general level, the contribution of the United Nations Sales Convention to upholding contractual freedom, which is its underpinning principle, was stressed.

327. It was further noted that in the last years a trend relating to the review and withdrawal of declarations had emerged. In that respect, the imminent withdrawal of the declarations lodged by Hungary upon ratification of the United Nations Sales Convention was announced and welcomed by the Commission. It was explained that such withdrawal would simplify the application of the Convention and further facilitate cross-border trade, and that the written form requirement for contracts for the international sale of goods was a legacy from the past. Similar considerations were expressed with respect to the withdrawal of the written form declaration by China in 2013 that, it was explained, aligned the United Nations Sales Convention with the principle of freedom of form already adopted in domestic law.

328. The desirability of coordinating the preparation of treaties and other texts on international sales law at the global and regional level was stressed. Likewise, it was

[73] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 315.

[74] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 255 (a).

added, coordination should occur in the promotion of the adoption and uniform interpretation of those texts. Relevant texts included those dealing with private international law issues, such as, for instance, the Inter-American Convention on the Law Applicable to International Contracts, 1994, as well as those prepared by non-governmental organizations.

329. It was widely recognized that the United Nations Sales Convention had been the model for a number of legislative texts at the regional and national level. Nevertheless, it was noted, the United Nations Sales Convention remained the only global text of legislative nature and, as such, deserved special attention. It was added that further work might be possible in some areas on which consensus could not be achieved at the time of the conclusion of the United Nations Sales Convention, but which were dealt with in subsequent uniform texts such as the Unidroit Principles of International Commercial Contracts, and the Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference. Those areas included issues of validity, including battle of forms, and specific performance. Other topics deserving special interest in order to promote the effective implementation of the United Nations Sales Convention included the duty of uniform interpretation and references to foreign cases in court decisions, and the application of the Convention by virtue of its article 1(1)(b) or through the choice of the parties to the contract for international sale of goods. Yet another topic was the application of the United Nations Sales Convention as *lex mercatoria*, i.e. as reflecting the prevalent position in international trade law, in particular, in arbitral proceedings and by specialized judicial branches.

330. With respect to national enactments of the United Nations Sales Convention, the example was provided of the influence of the Convention on the Civil Code of Hungary of 2013, which took inspiration from the Convention with respect to liability standards for non-performance or partial performance, determination of the amount of damages, and the notion of foreseeability.

331. China was referred to as another example of jurisdiction where the United Nations Sales Convention had greatly influenced national contract law. It was explained that the transposition of substantive rules from the Convention into domestic law was based on a number of important factors, including that the United Nations Sales Convention offered the most effective rules from both the common law and the civil law legal systems, expressed through a common uniform terminology, and that its rules were deemed particularly supportive of a market economy. Examples were provided with respect to simplification of the system of remedies for non-performance and partial performance, including the notion of fundamental breach. It was further noted that the United Nations Sales Convention was particularly suitable as a model for national law since it compiled provisions that might otherwise be scattered in different texts (e.g., general part on contract law, special part on sales law, evidence rules).

332. Reference was made to the desirability of taking into account the developments in legal thinking and business practice since the adoption of the United Nations Sales Convention, in 1980. The importance of enabling the use of new technologies was stressed. In that respect, it was said that the adoption of the Electronic Communications Convention would effectively update and complete the United Nations Sales Convention with provisions specifically designed for the use of electronic means.

333. The Commission expressed particular appreciation for the presentations of the experts and requested the Secretariat to take relevant initiatives to ensure that those presentations be published. Broad support was expressed for increasing, within available resources, the number of promotional and capacity-building activities aimed at supporting adoption and effective implementation of the United Nations Sales Convention. For instance, the possibility of studying in depth mechanisms to facilitate the uniform interpretation of the United Nations Sales Convention was mentioned. Another suggestion related to preparing a quantitative analysis of the benefits arising from the adoption of the Convention. Yet another suggestion pertained to the

consequences of recommending opting out of the application of the Convention without full analysis of the consequences of such choice, with particular regard to informing providers of legal services of their possible professional liability. States were invited to further contribute suggestions on the form and scope of those activities. However, the view was expressed that following up on the United Nations Sales Convention legislative work would be untimely given that it remained to be demonstrated whether such work was useful or desirable.

334. The Commission took note of the fact that some of the activities scheduled to celebrate the thirty-fifth anniversary of the United Nations Sales Convention had yet to take place, and asked the Secretariat to report on those activities at its forty-ninth session. Noting that the matter of sales of goods law had not been dealt with in a working group for about three decades, and that therefore a regular forum for the exchange of information relating to the promotion and implementation of the United Nations Sales Convention was not readily available in UNCITRAL, the Commission asked the Secretariat to report periodically on promotional and capacity-building activities aimed at supporting the Convention implementation, with a view to seeking strategic guidance on those activities.

XVII. Work Programme of the Commission

335. The Commission recalled its agreement to reserve time for discussion of the Commission's overall work programme as a separate topic at each Commission session, as a tool to facilitate effective planning of its activities.[75]

336. The Commission heard a summary of the documents prepared to assist its discussions on this topic (A/CN.9/841, further documents referred to therein and proposals submitted thereafter). It noted that these documents addressed UNCITRAL's main activities, i.e. legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (collectively referred to as "support activities").

337. The Commission took note of the progress of its Working Groups and regarding support activities reported earlier in the session (see chapters III to XVI of this report).

A. Legislative development

338. As regards the tabular presentation of future legislative activity (table 2 in document A/CN.9/841), the Commission decided as follows:

1. MSMEs

339. In relation to possible future work on MSMEs as set out in table 2, paragraph 13 of document A/CN.9/841, the view was expressed that it was hoped that UNCITRAL would be able to pursue work on financial inclusion, mobile payments, access to credit and alternative dispute resolution, among other topics.

340. It was agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation. The Commission again confirmed the mandate granted to Working Group I (see paras. 220 and 225 above).

2. Arbitration and conciliation

341. The Commission recalled the summary of its discussion on planned and future work in that area (see paras. 134-151 above). After discussion, it reaffirmed the mandate given to Working Group II to finalize the draft revised Notes, possibly utilizing parts of the sixty-fourth session of Working Group II (see para. 133 above). The Commission further confirmed its decision that work on the topic of enforcement of settlement agreements should be dealt with as a matter of priority by Working

[75] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310.

Group II beginning at its sixty-third session (see para. 142 above). It was further agreed that the topic of concurrent proceedings should remain on the agenda of the Commission as an item for future work, and the Commission reaffirmed its request to the Secretariat to explore the topic further (see para. 147 above). With respect to work on a code of ethics/conduct for arbitrators, the Commission reiterated its interest on that topic and reaffirmed its request to the Secretariat to explore the topic further and to report back at a future session (see para. 151 above). It was further noted that work on concurrent proceedings as well as a code of ethics/conducts should be considered in the context of both commercial and investment arbitration.

3. Online dispute resolution (ODR)

342. The Commission recalled that it had decided to consider progress in Working Group III and any future legislative activity on this topic together (see para. 226 above). The Commission took note of the main issues arising from the two Working Group sessions held since its forty-seventh session in 2014, namely that a third proposal for ODR Rules before the Working Group (which envisaged a single set of Rules) had not yet led to consensus on the issue of whether binding pre-dispute agreements to arbitrate concluded with consumers were to be given effect under the Rules. There remained fundamental differences on this question between States, despite the Working Group's strenuous efforts to broker consensus. Some States had considered that the Commission should consider terminating the mandate of the Working Group in consequence, but others had expressed the view that the Working Group should continue with its efforts to find a consensus based on the third proposal. The Commission also heard that intersessional consultations since the Working Group's thirty-first session had not resulted in further progress.

343. The Commission heard a proposal from the delegation of Israel (A/CN.9/857), suggesting that UNCITRAL could develop a non-binding instrument for use by ODR providers and neutrals, whose aim would be to assist and support ODR practitioners. Such an instrument, it was said, would be in line with the existing mandate of the Working Group and could address various agreed-upon issues with respect to the general functioning of ODR providers and to case management. The title of the instrument, it was noted, did not need to be specified at this point. This approach, it was added, could enhance the reliability, impartiality and efficiency of ODR proceedings to encourage their use in high-volume, low-value, cross-border online commercial transactions. The instrument could build upon the significant progress made by the Working Group so far, without the need to address the complex issues regarding binding pre-dispute arbitration for consumers noted above.

344. It was also suggested that the Secretariat could prepare a draft for the non-binding instrument on the basis of the previous deliberations of the Working Group and in consultation with leading experts. In this context, issues not previously discussed but identified as relevant for such an instrument could then be addressed by the Working Group. It was also suggested that the Working Group could discuss a draft at its next two sessions. The proponent therefore stated that it did not support the suggestion that the Working Group's mandate should be terminated.

345. In response, it was observed that the lack of progress in the Working Group on the fundamental issue described above was such that it would not be appropriate for the work on ODR to continue, that the scarce resources of UNCITRAL should be deployed elsewhere, and accordingly that the mandate should indeed be terminated.

346. Another view was that the mandate itself should be construed more broadly, as its original formulation permitted: as recorded in the report of the Working Group on the work of its thirty-first session (A/CN.9/833, para. 3), the mandate referred to a "range of means … including arbitration" for ODR, and did not limit the form of the text to the Rules. It was further observed that the mandate included both business to business (B2B) and (business to consumer (B2C) transactions. It was conceded, however, that the precise scope of the mandate might require further elaboration, in that there were different views on the interpretation of "ODR", notably on whether the concept included online arbitration, and online mediation and conciliation. The

mandate had been granted, it was recalled, on the basis that there was existing practice in need of harmonization. As the Working Group took up its mandate, it had become clear that there were differences about the recognition of pre-dispute agreements to arbitrate in the consumer context, which had led to the preparation of two tracks of the Rules to reflect the different positions. That approach had ultimately yielded to the third proposal, which itself was subject to several interpretations reflecting this very disagreement among delegations. It was observed, in this regard, that this third proposal remained before the Working Group and that terminating the mandate of the Working Group would therefore be inappropriate and discourteous to its proponents.

347. Support was expressed for continuing the mandate of the Working Group but for changing its focus to produce a non-binding text (whose nature could remain flexible at this stage, though suggestions for "instructions", "guidelines" and "notes" were made). In this regard, it was emphasized that the Working Group had already achieved consensus on many issues for an ODR procedure, reflecting substantive and significant progress, and it was suggested that the fundamental disagreement noted above could be resolved.

348. A further proposal was submitted by Colombia, Honduras and the United States (A/CN.9/858). It was explained that the proposal envisaged a non-binding descriptive instrument, of a technical and explanatory nature reflecting elements of an ODR process, which would address a range of technical issues while avoiding those issues that had proved irreconcilable in the Working Group. In this regard, the proposed text would not favour any particular system, would reflect the progress to date in the Working Group, and thus reflected an approach similar to that of the proposal from Israel. It was emphasized that the aim was to offer a source of guidance in this critical area of dispute resolution.

349. It was added that there would be a need to impose a time limit for the work envisaged, which was suggested to be no more than one year or two Working Group sessions.

350. Support for both the proposal and for setting this time frame was expressed. In addition, the importance of consumer protection and consequently of including B2C transactions in the scope of a future text were underscored.

351. In addition, the various compromise proposals that had been placed before the Working Group were recalled,[76] upon which consensus had not proved possible. In this regard, and in order to avoid reaching an impasse similar to that previously encountered in the Working Group, it was suggested that the Commission should provide a precise mandate to the Working Group for the non-binding text proposed, which would also be necessary to give practical effect to the proposed limited time frame. Recognizing the significant work that had been devoted to the earlier proposals, it was suggested that the Working Group be given an open mandate.

352. It was agreed that any future text should build upon the progress on the third proposal and other proposals. The Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration). It was also agreed that the Working Group would be given a time limit of one year or no more than two Working Group sessions, after which the work of the Working Group would come to an end, whether or not a result had been achieved.

353. On a practical level, it was noted that the proposed date for the autumn 2015 session of Working Group III would not be commensurate with the degree of preparation that would be necessary. Difficulties in finding further dates for the autumn session were noted, and the Secretariat was requested to find dates in December if possible. An alternative suggestion was that the Working Group could meet only in the spring of 2016, with preparatory work being undertaken using virtual

[76] That is, those set out in document A/CN.9/WG.III/121 and in paragraph 142 and paragraphs following it in the report of the Working Group on the work of its thirty-first session (A/CN.9/833).

meetings and other online tools. It was also emphasized that the participants in the Working Group would need to prepare for the sessions well in advance, so that the working papers would need to be circulated in good time. The Commission agreed to revert to this question when setting the dates for the Working Group sessions for the forthcoming year (see para. 385 (c) below regarding the agreed dates for the autumn 2015 session of the Working Group).

4. Electronic commerce

354. The Commission heard illustrations of the three proposals relating to future work on electronic commerce submitted for its attention, namely on legal issues related to identity management and trust services (A/CN.9/854), on contractual issues in the provision of cloud computing services (A/CN.9/856) and on issues relating to mobile commerce and payments effected with mobile devices (A/CN.9/WG.IV/WP.133).

355. Broad interregional consensus was expressed on the desirability of conducting work on identity management and trust services. The importance of the topic for other suggested future work in the field of electronic commerce as well as its relevance for the current mandate of Working Group IV and for existing UNCITRAL texts was stressed. It was indicated that the scope of that work should be better defined, for instance by specifying that it could deal with the use of public trust frameworks for commercial relations, but should not extend to matters clearly outside UNCITRAL's mandate. In order to define the methodology of work, those member States that initiated this proposal expressed their availability to support the Secretariat, specifically by organizing a colloquium on this issue.

356. Broad consensus was also expressed for undertaking work in the field of cloud computing. It was suggested that that work could take the form of guidance material or as otherwise appropriate, and should cover the perspectives of all parties involved, i.e. service providers, users and concerned third parties. It was further suggested that private international law aspects should be discussed, possibly in cooperation with the Hague Conference on Private International Law.

357. Support was also expressed for undertaking work on the legal aspects of the use of mobile devices, especially for its potential relevance for developing countries. However, it was added, caution should be used in order to avoid touching upon regulatory matters. It was further indicated that, while matters relating to payments with electronic means had great relevance for international trade and it might be particularly desirable to update existing UNCITRAL texts in that field, any work proposal required further illustration given the complexity of the subject.

358. The Commission accordingly instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level following the current work on electronic transferable records. The Commission also asked the Secretariat to share the result of that preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session. If the current work of the Working Group was concluded prior to the next session of the Commission, the Working Group could take up the subjects mentioned above.

5. Insolvency

359. The Commission considered the issue raised in paragraph 15 (c) of document A/CN.9/841 on the insolvency treatment of financial contracts and noted the update provided by the Secretariat with respect to the work of international organizations in paragraphs 1-5 of document A/CN.9/851. After discussion, the Commission agreed that Working Group V should focus on the topics currently before it (as noted in paras. 232-237 above) and that work on updating the chapter of the

UNCITRAL Legislative Guide on Insolvency Law[77] relating to the insolvency treatment of financial contracts should not be taken up at this time.

360. The Commission also noted the information provided to it in document A/CN.9/851 with respect to sovereign debt restructuring and agreed that the Secretariat should not be requested to monitor international developments on that topic.

6. Security interests

361. It was noted that the Commission would be taking up the draft Model Law, with a view to approval of parts thereof, during the third week of the session (see paras. 166-214 above). It was noted that the Working Group had undertaken its work on the elaboration of a model law mindful of the benefits of an accompanying guide to enactment that would set out background and explanatory information for the benefit of enacting States. The Commission agreed that it would confirm whether the Working Group should indeed prepare such a guide to enactment for submission to the Commission session in 2016, together with the final draft of a model law on secured transactions, later in the session. The Commission also noted that it would consider other possible future topics in the field of security interests (a contractual guide on secured transactions in particular for small- and medium-sized enterprises and enterprises in developing countries, and a uniform law text on intellectual property licensing), at a future time and on the basis of more detailed information from the Secretariat following meetings of experts and/or one or more colloquia. (For the decisions of the Commission on those matters, see paras. 215-217 above.)

7. Public procurement and infrastructure development

362. The Commission took note of the proposals set out in document A/CN.9/850. As regards the proposal for future work on the topic of suspension and debarment in public procurement, the importance of the topic was agreed. Support was expressed for the proposal that the Secretariat should engage in preparatory work towards the possible development of a legislative text in this area. In this regard, the Commission heard that the issues raised had been the subject of discussion among European Union member States and other States, and that there were indeed significant differences in practice. Consequently, it was said, this was a topic upon which a harmonized UNCITRAL text would support the effective implementation and use of the UNCITRAL Model Law on Public Procurement.[78] On the other hand, some concern was expressed that a legislative text might not be an appropriate solution to the issues identified, and that the demand for such a text from States, rather than from within the donor community, should be explored. The Secretariat was instructed to report to the Commission at its 2016 session on the results of its exploratory work on the question.

363. As regards public-private partnerships (PPPs), support was expressed for the proposal as set out in document A/CN.9/850, and the importance of the topic to developing countries in particular was emphasized. The suggestion was made that one or more colloquia should be held, so as to ensure an inclusive and multilingual approach to developing a legislative text on PPPs, and to ensure that there would be sufficient time available to States to consider the proposed provisions and guidance before a text were presented to the Commission for its consideration and possible adoption. The view was expressed, on the other hand, that in light of the time that was required for the development of the existing UNCITRAL texts in the area of privately financed infrastructure projects[79] and the efforts of the Secretariat in recent years, there was a risk that the project would turn into a lengthy one, and might eventually involve working group resources. For that reason, it was said that the Commission

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

[78] General Assembly resolution 66/95, annex.

[79] The *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000) and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* (2003), available from www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

should not take up the proposal at this time. A further view was that the resource implications, which would not at this stage be extensive either for the Secretariat or for the member States, were appropriate given the importance of the topic. The opinion that the topic was not amenable to harmonization, which had been expressed at the previous Commission session, was repeated. It was decided, in light of the other decisions implicating UNCITRAL's resources made earlier at the session, that the topic would be kept on the Commission's agenda, that the Secretariat would continue to follow the topic to advance preparations should it eventually be taken up, and that the Secretariat would report further to the Commission in 2016.

364. In light of confirmation of the mandates of the Working Groups and the activities assigned for legislative development as set out in paragraphs 339-361 above, the Commission agreed that there were no further resource issues to be addressed on that topic.

B. Support activities

365. The Commission expressed its appreciation for the support activities described in documents A/CN.9/837, A/CN.9/838, A/CN.9/839, A/CN.9/840, A/CN.9/842, A/CN.9/843 and A/CN.9/845, as considered earlier in this session (see chapters X to XV of this report), and requested the Secretariat to continue with those activities to the extent that its resources permitted.

C. Commemoration of the fiftieth anniversary of the establishment of UNCITRAL

366. The Commission heard of the successful conclusion of the 1992 UNCITRAL Congress,[80] which had included both retrospective and prospective elements, and expressed its agreement with the suggestion that a third UNCITRAL congress should be held to commemorate UNCITRAL's fiftieth anniversary. The Secretariat was requested to undertake preparatory work towards the organization of such a congress, as suggested in paragraph 33 of the note by the Secretariat (A/CN.9/841), and to make proposals to the Commission at its forty-ninth session in 2016 on the basis that the Congress would take place in 2017. It was suggested that the event should be designed so as to promote the profile of UNCITRAL and enhance public awareness of UNCITRAL's successful activities during its first fifty years of operation.

XVIII. Relevant General Assembly resolutions

367. The Commission took note of the following two General Assembly resolutions adopted on the recommendation of the Sixth Committee: resolution 69/115 on the report of the United Nations Commission on International Trade Law on the work of its forty-seventh session; and resolution 69/116 on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

XIX. Other business

A. Entitlement to summary records

368. The Commission recalled that at its forty-fifth session, in 2012, it decided, while not relinquishing its entitlement to summary records under General Assembly resolution 49/221, to request that digital recordings continue to be provided at its forty-sixth and forty-seventh sessions, in 2013 and 2014, on a trial basis, in

[80] *Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992* (United Nations publication, Sales No. E.94.V.14).

addition to summary records, as was done for the forty-fifth session.[81] At its forty-seventh session, in 2014, the Commission assessed the experience of using digital recordings and on the basis of that assessment decided to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records for at least one more year. It was noted that at its next session the Commission would again assess its experience with the use of digital recordings. It was understood that until it was ascertained that no obstacles existed to making the transition from summary records to digital recordings, summary records would have to be provided to the Commission.[82]

369. At its forty-eighth session, the Commission heard an oral report of the Secretariat on the experience with the use of UNCITRAL's digital recordings and developments as regards General Assembly resolution 67/237, paragraph 26, stating that "the further expansion of [transition to digital recordings of meetings in the six official languages of the Organization as a cost-saving measure] would require consideration, including of its legal, financial and human resources implications, by the General Assembly and full compliance with the relevant resolutions of the Assembly".

370. The Commission noted that the wording found in General Assembly resolution 67/237 was repeated in General Assembly resolution 69/250, paragraph 105, with the request to the Secretary-General to report on the use of digital recordings to the Assembly at its seventieth session. In light of this resolution, the Commission decided again to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records for at least one more year. It was noted that at its next session the Commission would again assess its experience with the use of digital recordings.

B. Internship programme

371. The Commission recalled the considerations taken by its secretariat in selecting candidates for internship. It also recalled the procedure for selecting interns that was put in place from 1 July 2013, changes introduced on 13 January 2014 in eligibility requirements for internship with the United Nations and the reported positive implications thereof on the pool of eligible and qualified candidates for internship from under-represented countries, regions and language groups.[83]

372. The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-seventh session, in July 2014, thirteen new interns had undertaken an internship with the UNCITRAL secretariat in Vienna. Most interns were coming from developing countries and countries in transition, among them one coming from a least developed country and one coming from a small island developing country.

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

373. The Commission recalled that at its fortieth session, in 2007,[84] it had been informed of the programme budget for the biennium 2008-2009, which listed among the expected accomplishments of the Secretariat "facilitating the work of UNCITRAL". The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a

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[81] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 249.

[82] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 271-276.

[83] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328-330; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 344; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 277 and 278.

[84] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.

rating on a scale ranging from 1 to 5 (5 being the highest rating).[85] At that session, the Commission had agreed to provide feedback to the Secretariat.

374. From the fortieth session until the forty-fifth session of the Commission, in 2012, the feedback was provided by States attending the annual sessions of UNCITRAL in response to the questionnaire circulated by the Secretariat by the end of the session. That practice had changed since the Commission's forty-fifth session, in 2012, partly because of the need to solicit more responses: instead of an in-session questionnaire, the Secretariat started circulating to all States closer to the start of an annual session of the Commission a note verbale with the request to indicate, by filling in the evaluation form enclosed to the note verbale, their level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat during a given session. As regards the forty-eighth session of UNCITRAL such a note verbale was circulated to all Member States of the United Nations on 3 June 2015 and the period covered was indicated from the start of the forty-seventh session of UNCITRAL (7 July 2014).

375. The Commission was informed that the request had elicited seventeen responses and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained high (twelve States respondents gave 5 out of 5 and five States respondents gave 4 out of 5). The Commission heard that States in their statements to the Sixth Committee of the General Assembly on the report of the Commission often included their views on the work of the UNCITRAL secretariat in servicing the Commission. Such statements did not lend themselves to the easy quantitative assessment.

376. The Commission took note of the concern that the level of responses to the request for evaluation remained low and that it was essential to receive from more States the feedback about the UNCITRAL secretariat's performance for a more objective evaluation of the role of the Secretariat. This was required for budgetary and other purposes. The Commission expressed appreciation to the Secretariat for its work in servicing UNCITRAL.

D. Measures to achieve the optimum utilization by UNCITRAL of conference servicing resources

377. The Commission was informed about a letter of 22 April 2015 from the Chair of the Committee on Conferences addressed to the Chair of the forty-seventh session of UNCITRAL. The letter referred to underutilization of conference services by UNCITRAL in 2012-2014 and suggested measures to achieve the optimum utilization of conference servicing resources, in particular by:

(a) Reducing cancellation of meetings by programming only the number of meetings anticipated based on past patterns;

(b) Considering additional items in the programme if time remains at the end of a scheduled meeting;

(c) Reducing the meeting blocks to two hours;

(d) Informing the Meetings Management Section of anticipated late starts and early endings at least the day before to free up unused portions of interpretation services.

378. The Commission, while acknowledging that there was room for improvement, in particular in the punctual start of meetings, was of the view that the nature of the work of UNCITRAL as an expert legal body did not make it possible to plan its meetings precisely. The number, length and content of statements, the level of controversy that they might raise and the time needed to reach compromise could not be predicted. In addition, technical terms involved often complicated their interpretation and understanding in the six languages of the United Nations, which

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

occasionally called for a longer dialogue and informal consultations. The view was therefore expressed that the specialized nature of UNCITRAL and the highly technical and complex field that it dealt with needed to be taken into account. This made UNCITRAL distinct from other United Nations bodies operating on a more predictable pattern.

379. Nevertheless the Commission agreed that the concerns expressed on behalf of the Committee on Conferences were to be seriously considered and taken into account and the Commission should remain vigilant. A question was raised whether utilization by the Commission and its working groups of conference time for informal consultations could negatively affect UNCITRAL's record on utilization of conference services. In response, the Commission was generally of the view that the indispensable role of informal consultations in reaching compromises and consensus should be emphasized. The Secretariat was requested to ensure that their use at any point in time, before, during or after more formal discussion, were indeed considered and recorded as legitimate use of the allocated conference time.

380. Specific reference was made to the high number of cancelled meetings during the Commission session in 2014 and late starts and early ends of meetings during the Commission session in 2013. While admitting that the number of cancelled meetings in 2014 was indeed an anomaly and the result of unexpectedly productive deliberations, the view was expressed that the Commission and its working groups should not find themselves in the situation when they had to continue deliberations for the sake of fully utilizing conference services. Qualitative aspects of UNCITRAL's work should never be overlooked in efforts to improve statistics on utilization of conference services.

381. The UNCITRAL secretariat was commended for its excellent job in carefully planning the duration of Commission sessions, scheduling meetings and distributing agenda items throughout any given session taking into account an expected workload.

382. After discussion, the Commission agreed to transmit to the Committee on Conferences the following message:

> "The Commission took note of concerns about underutilization of conference services by UNCITRAL in 2012-2014 and measures to improve the situation, contained in the letter of 22 April 2015 from the Chair of the Committee on Conferences to the Chair of the forty-seventh session of UNCITRAL.
>
> The Commission appreciates the high-quality conference services provided to the Commission and was committed to utilizing them efficiently. It supports efforts across the United Nations to that end. It takes note of the suggested measures noting however that its mandate, nature and methods of work would not always permit implementing them."

XX. Date and place of future meetings

383. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[86]

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

A. Forty-ninth session of the Commission

384. In the light of the considerations set out above, the Commission approved the holding of its forty-ninth session in New York from 27 June to 15 July 2016 (the United Nations Headquarters is closed on 4 and 7 July 2016). 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

1. Sessions of working groups between the forty-eighth and forty-ninth sessions of the Commission

385. In the light of the considerations set out above, the Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (MSMEs) would hold its twenty-fifth session in Vienna from 19 to 23 October 2015 and the twenty-sixth session in New York from 4 to 8 April 2016;

(b) Working Group II (Arbitration and Conciliation) would hold its sixty-third session in Vienna from 7 to 11 September 2015 and its sixty-fourth session in New York from 1 to 5 February 2016;

(c) Working Group III (Online Dispute Resolution) would hold its thirty-second session in Vienna from 30 November to 4 December 2015 and its thirty-third session in New York from 29 February to 4 March 2016;

(d) Working Group IV (Electronic Commerce) would hold its fifty-second session in Vienna from 9 to 13 November 2015 and its fifty-third session in New York from 9 to 13 May 2016;

(e) Working Group V (Insolvency Law) would hold its forty-eighth session in Vienna from 14 to 18 December 2015 and its forty-ninth session in New York from 2 to 6 May 2016;

(f) Working Group VI (Security Interests) would hold its twenty-eighth session in Vienna from 12 to 16 October 2015 and its twenty-ninth session in New York from 8 to 12 February 2016.

2. Sessions of working groups in 2016 after the forty-ninth session of the Commission

386. The Commission noted that tentative arrangements had been made for working group meetings in 2016 after its forty-ninth session, subject to the approval by the Commission at that session:

(a) Working Group I (MSMEs) would hold its twenty-seventh session in Vienna from 3 to 7 October 2016;

(b) Working Group II (Arbitration and Conciliation) would hold its sixty-fifth session in Vienna from 5 to 9 September 2016;

(c) Working Group III would hold its thirty-fourth session in Vienna from 19 to 23 September 2016;

(d) Working Group IV (Electronic Commerce) would hold its fifty-fourth session in Vienna from 31 October to 4 November 2016;

(e) Working Group V (Insolvency Law) would hold its fiftieth session in Vienna from 12 to 16 December 2016;

(f) Working Group VI (Security Interests) would hold its thirtieth session in Vienna from 5 to 9 December 2016.

Annex

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

Symbol	*Title or description*
A/CN.9/824	Provisional agenda, annotations thereto and scheduling of meetings of the forty-eighth session
A/CN.9/825	Report of Working Group I (MSMEs) on the work of its twenty-third session
A/CN.9/826	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-first session
A/CN.9/827	Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session
A/CN.9/828	Report of Working Group IV (Electronic Commerce) on the work of its fiftieth session
A/CN.9/829	Report of Working Group V (Insolvency Law) on the work of its forty-sixth session
A/CN.9/830	Report of Working Group VI (Security Interests) on the work of its twenty-sixth session
A/CN.9/831	Report of Working Group I (MSMEs) on the work of its twenty-fourth session
A/CN.9/832	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session
A/CN.9/833	Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session
A/CN.9/834	Report of Working Group IV (Electronic Commerce) on the work of is fifty-first session
A/CN.9/835	Report of Working Group V (Insolvency Law) on the work of its forty-seventh session
A/CN.9/836	Report of Working Group VI (Security Interests) on the work of its twenty-seventh session
A/CN.9/837	Technical cooperation and assistance
A/CN.9/838	Coordination activities
A/CN.9/839	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/840	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/841	Planned and possible future work
A/CN.9/842	Activities of the UNCITRAL Regional Centre for Asia and the Pacific
A/CN.9/843	Status of conventions and model laws
A/CN.9/844	Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings
A/CN.9/845	Technical assistance to law reform
A/CN.9/846 and Adds.1-5	Settlement of commercial disputes — Enforcement of settlement agreements resulting from international commercial conciliation/mediation — Compilation of comments by Governments
A/CN.9/847	Principles on Choice of Law in International Commercial Contracts
A/CN.9/848	Concurrent proceedings in investment arbitration
A/CN.9/849	Current trends in the field of international sale of goods law
A/CN.9/850	Planned and possible future work in procurement and infrastructure development
A/CN.9/851	Insolvency Law: treatment of financial contracts and netting; sovereign debt restructuring
A/CN.9/852	Draft Model Law on Secured Transactions (Chapter IV)
A/CN.9/853	Draft Model Law on Secured Transactions (Chapter VIII-IX)
A/CN.9/854	Possible future work in the area of electronic commerce — legal issues related to identity management and trust services

Symbol	*Title or description*
A/CN.9/855	Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators
A/CN.9/856	Possible future work in the area of electronic commerce — Contractual issues in the provision of cloud computing services — Proposal by Canada
A/CN.9/857	Possible future work in the area of online dispute resolution — Proposal by Israel
A/CN.9/858	Possible future work in the area of online dispute resolution — Proposal by Colombia, Honduras and the United States

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

(TD/B/62/11)

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

At its 1135th plenary meeting, the Board took note of the annual report of the United Nations Commission on International Trade Law at its forty-eighth session (A/70/17), held in Vienna from 29 June to 16 July 2015.

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-eighth session (A/70/507)

[Original: English]

Rapporteur: Mr. Idrees Mohammed Ali Mohammed **Saeed** (Sudan)

I. Introduction

1. At its 2nd plenary meeting, on 18 September 2015, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its seventieth session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its forty-eighth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 10th, 23rd and 26th meetings, on 19 October and on 9 and 11 November 2015. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records (A/C.6/70/SR.10, 23 and 26).

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-eighth session (A/70/17).

4. At the 10th meeting, on 19 October, the Chair of the United Nations Commission on International Trade Law at its forty-eighth session introduced the report of the Commission on the work of its forty-eighth session.

II. Consideration of draft resolution A/C.6/70/L.9

5. At the 23rd meeting, on 9 November, the representative of Austria, on behalf of Argentina, Armenia, Austria, Belarus, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Japan, Liechtenstein, Lithuania, Luxembourg, the Netherlands, New Zealand, Nigeria, the Philippines, the Republic of Korea, Serbia, Singapore, Sweden, Trinidad and Tobago, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America, subsequently joined by Australia, El Salvador, Israel, Madagascar, Romania, the Russian Federation, Slovenia, Switzerland and Thailand, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its forty-eighth session" (A/C.6/70/L.9).

6. At the 26th meeting, on 11 November, Chile, Georgia and Portugal joined in sponsoring the draft resolution.

7. At the same meeting, the Committee adopted draft resolution A/C.6/70/L.9 without a vote (see para. 8).

III. Recommendation of the Sixth Committee

8. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

Report of the United Nations Commission on International Trade Law on the work of its forty-eighth 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,[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;[1]

2. *Notes with approval* the view of the Commission that the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[2] should be fully operational as soon as possible, as the repository constituted a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency)[3] by providing a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Rules on Transparency and the Convention, and in this regard requests the Secretary-General to establish and operate through the secretariat of the Commission the repository of published information under the Rules on Transparency, in accordance with article 8 of the Rules, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions;

3. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law, security interests and international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle, and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes;

4. *Notes with appreciation* the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), done at New York on 10 June 1958,[4] including the preparation of a guide entitled “UNCITRAL

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17).
[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[3] Resolution 69/116, annex.
[4] United Nations, *Treaty Series*, vol. 330, No. 4739.

Secretariat Guide on the New York Convention", in close cooperation with international experts;[5]

5. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law 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;

6. *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 and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, 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 with the Commission 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 international development agenda, including the achievement of the 2030 Agenda for Sustainable Development;[6]

(e) Recalls its resolutions stressing 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, welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients, and takes note of the ongoing discussion in the Commission of ways to strengthen support to Member States, upon their request, in the implementation of sound commercial law reforms;

7. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on

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[5] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. III, sect. E; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 117.

[6] Resolution 70/1.

the work of its forty-third session,[7] requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, and in this regard recalls its previous resolutions related to this matter;

8. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region, notes with satisfaction expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;[8]

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 those countries to put in place a regulatory and enabling environment for business, trade and investment;

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

11. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in 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;

12. *Notes* the rule of law panel discussion held at the forty-eighth session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law, in particular the role of the multilateral treaty processes of the Commission in promoting and advancing the rule of law in the field of international trade law,[9] pursuant to paragraph 17 of General Assembly resolution 69/123 of 10 December 2014;

13. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

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[7] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17).

[8] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. XIII.

[9] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), chap. XV.

14. *Also notes with satisfaction* that, in paragraph 89 of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted by the General Assembly by consensus as resolution 69/313 of 27 July 2015, States endorsed 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;

15. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[10] which, in particular, emphasize that any invitation to limit, where appropriate, 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 functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;[11]

16. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the Commission's decision to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;[12]

17. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

18. *Stresses* the importance of promoting the use of texts 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 conventions, enacting model laws and encouraging the use of other relevant texts;

19. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

20. *Welcomes* the continued work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade;

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[10] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

[11] Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 124-128.

[12] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 276.

21. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,[13] commends the fact that the website of the Commission is published in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines.[14]

[13] Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61-76; 59/126 B, sect. V, paras. 76-95; 60/109 B, sect. IV, paras. 66-80; and 61/121 B, sect. IV, paras. 65-77.

[14] Resolution 63/120, para. 20.

D. General Assembly resolutions 70/115 and 70/118

70/115. Report of the United Nations Commission on International Trade Law on the work of its forty-eighth 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,[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;[1]

2. *Notes with approval* the view of the Commission that the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[2] should be fully operational as soon as possible, as the repository constituted a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency)[3] by providing a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Rules on Transparency and the Convention, and in this regard requests the Secretary-General to establish and operate through the secretariat of the Commission the repository of published information under the Rules on Transparency, in accordance with article 8 of the Rules, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions;

3. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law, security interests and international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17).
[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[3] Resolution 69/116, annex.

life cycle, and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes;

4. *Notes with appreciation* the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), done at New York on 10 June 1958,[4] including the preparation of a guide entitled "UNCITRAL Secretariat Guide on the New York Convention", in close cooperation with international experts;[5]

5. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law 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;

6. *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 and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(*c*) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, 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 with the Commission 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 international development agenda, including the achievement of the 2030 Agenda for Sustainable Development;[6]

(*e*) Recalls its resolutions stressing 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, welcomes the efforts of the Secretary-General to ensure greater coordination

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

[5] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. III, sect. E; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 117.

[6] Resolution 70/1.

and coherence among United Nations entities and with donors and recipients, and takes note of the ongoing discussion in the Commission of ways to strengthen support to Member States, upon their request, in the implementation of sound commercial law reforms;

7. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,[7] requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, and in this regard recalls its previous resolutions related to this matter;

8. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region, notes with satisfaction expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;[8]

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 those countries to put in place a regulatory and enabling environment for business, trade and investment;

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

11. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in 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;

12. *Notes* the rule of law panel discussion held at the forty-eighth session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law, in particular the role of the multilateral treaty processes of the Commission in promoting and advancing the rule of law in the field of international trade law,[9] pursuant to paragraph 17 of General Assembly resolution 69/123 of 10 December 2014;

13. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized the importance of fair, stable and predictable legal

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[7] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17).
[8] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. XIII.
[9] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), chap. XV.

frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

14. *Also notes with satisfaction* that, in paragraph 89 of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted by the General Assembly by consensus as resolution 69/313 of 27 July 2015, States endorsed 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;

15. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[10] which, in particular, emphasize that any invitation to limit, where appropriate, 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 functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;[11]

16. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the Commission's decision to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;[12]

17. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

18. *Stresses* the importance of promoting the use of texts 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 conventions, enacting model laws and encouraging the use of other relevant texts;

19. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

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[10] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

[11] Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 124–128.

[12] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 276.

20. *Welcomes* the continued work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade;

21. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,[13] commends the fact that the website of the Commission is published in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines.[14]

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[13] Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61–76; 59/126 B, sect. V, paras. 76–95; 60/109 B, sect. IV, paras. 66–80; and 61/121 B, sect. IV, paras. 65–77.

[14] Resolution 63/120, para. 20.

70/118. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 69/123 of 10 December 2014,

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,

Bearing in mind that the activities of the United Nations carried out in support of efforts of Governments to promote and consolidate the rule of law are undertaken in accordance with the Charter, and stressing 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,

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 its Member States,

Recalling paragraph 134 (*e*) of the 2005 World Summit Outcome,[1]

1. *Recalls* the high-level meeting of the General Assembly on the rule of law at the national and international levels, held during the high-level segment of its sixty-seventh session, and the declaration adopted at that meeting,[2] takes note of the report of the Secretary-General submitted pursuant to paragraph 41 of the declaration,[3] and requests the Sixth Committee to continue its consideration of ways and means of further developing the linkages between the rule of law and the three pillars of the United Nations;

2. *Acknowledges* the efforts to strengthen the rule of law through voluntary pledges, encourages all States to consider making pledges, individually or jointly, based on their national priorities, and also encourages those States that have made pledges to continue to exchange information, knowledge and best practices in this regard;

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[1] Resolution 60/1.
[2] Resolution 67/1.
[3] A/68/213/Add.1.

3. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;[4]

4. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

5. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and further reaffirms that States shall abide by all of their obligations under international law;

6. *Also reaffirms* the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter of the United Nations;

7. *Welcomes* the adoption of the 2030 Agenda for Sustainable Development;[5]

8. *Recognizes* the role of multilateral treaty processes in advancing the rule of law, recalls the constructive debate held on this subtopic in the Sixth Committee during its seventieth session, and in this regard:

(*a*) Reaffirms its support for the annual treaty event organized by the Secretary-General, which provides an opportunity for States to increase their participation in the multilateral treaty framework;

(*b*) Recognizes the importance of the registration and publication of treaties in accordance with Article 102 of the Charter, and invites the Secretary-General to review the regulations giving effect to that article,[6] taking into account recent developments, and to submit the result of that review to the Sixth Committee for consideration at the seventy-first session of the General Assembly;

(*c*) Welcomes the efforts made to develop and enhance the United Nations electronic treaty database, providing online access to comprehensive information on the depositary functions of the Secretary-General and the registration and publication of treaties under Article 102 of the Charter, and encourages the continuation of such efforts in the future, while bearing in mind that many developing countries lack affordable access to information and communication technologies;

(*d*) Recognizes the importance of the legal publications prepared by the Treaty Section of the Office of Legal Affairs of the Secretariat, emphasizes the need for those publications, particularly the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, to be updated, taking into account new developments and practices, and invites the Secretary-General to include, as appropriate, brief information on such developments and practices in the next annual report;

(*e*) Welcomes the organization of workshops on treaty law and practice by the Treaty Section, both at the regional level and at United Nations Headquarters, as an important capacity-building initiative, and invites States to continue to support this activity;

9. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit in the Executive Office of the Secretary-General 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;

10. *Recognizes* the importance of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law to the furtherance of United Nations rule of law programmes and activities, emphasizes that further technical assistance and capacity-building initiatives, focused

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[4] A/70/206.

[5] Resolution 70/1.

[6] Resolutions 97 (1) of 14 December 1946, 364 B (IV) of 1 December 1949, 482 (V) of 12 December 1950, 33/141 A of 19 December 1978 and 52/153 of 15 December 1997.

on increasing and improving the participation of Member States in the multilateral treaty process, should be examined, and invites States to support these activities;

11. *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 in order to develop, reinforce and maintain domestic institutions active in the promotion of rule of law at the national and international levels, subject to national ownership, strategies and priorities;

12. *Reiterates its request* to the Secretary-General to ensure greater coordination and coherence among the United Nations entities and with donors and recipients, and reiterates its call for greater evaluation of the effectiveness of such activities, including possible measures to improve the effectiveness of those capacity-building activities;

13. *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, while recognizing that rule of law activities must be anchored in a national context and that States have different national experiences in the development of their systems of the rule of law, taking into account their legal, political, socioeconomic, cultural, religious and other local specificities, while also recognizing that there are common features founded on international norms and standards;

14. *Calls upon* the Secretary-General and the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, including the participation of women in rule of law-related activities, recognizing the importance of the rule of law to virtually all areas of United Nations engagement;

15. *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 and under the leadership of the Deputy Secretary-General;

16. *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, addressing, in a balanced manner, the national and international dimensions of the rule of law;

17. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;

18. *Recalls* the commitment of Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid, encourages further dialogue and the sharing of national practices in strengthening the rule of law through access to justice, including with regard to birth registration and legal aid, where appropriate, in both criminal and civil proceedings, and in this regard stresses the need to intensify the assistance extended to Governments upon their request;

19. *Stresses* the importance of promoting the sharing of national practices and of inclusive dialogue, welcomes the proposals made by the Secretary-General, inviting Member States to voluntarily exchange national best practices on the rule of law in informal meetings and on an electronic depository of best practices on the United Nations rule of law website, and invites Member States to do so;

20. *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;

21. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue their dialogue with all Member States by interacting with them

in a regular, transparent and inclusive manner, in particular in informal briefings, and welcomes the informal briefings held during the sixty-ninth session;

22. *Stresses* the need for the Rule of Law Unit to carry out its tasks in an effective and sustainable manner and the need to provide it with reasonable means required to that effect;

23. *Decides* to include in the provisional agenda of its seventy-first session the item entitled "The rule of law at the national and international levels", and invites Member States to focus their comments during the upcoming Sixth Committee debate on the subtopics "Sharing national practices of States in the implementation of multilateral treaties" and "Practical measures to facilitate access to justice for all, including for the poorest and most vulnerable".

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Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES (MSMES)

A. Report of Working Group I (MSMEs) on the work of its twenty-third session (Vienna, 17-21 November 2014)

(A/CN.9/825)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10-14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. Based upon the issues raised in working paper A/CN.9/WG.I/WP.82, the Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation[3] as well as on what form that text might take.[4] Business registration was also said to be of particular relevance in the future deliberations of the Working Group.[5] In order to make further progress in fulfilling its mandate, the Working Group requested the Secretariat to prepare a document setting out best practices in respect of business registration, as well as "a template on simplified incorporation and registration containing contextual elements and experiences linked to the

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.
[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.84, paras. 5-14.
[3] A/CN.9/800, paras. 22-31, 39-46 and 51-64.
[4] Ibid., paras. 32-38.
[5] Ibid., paras. 47-50.

mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly, but not exclusively, as they applied to MSMEs in developing countries."[6] In addition, States were invited to prepare materials outlining their experience in respect of alternative approaches to the challenges of simplified incorporation and supporting MSMEs.[7]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, relative to reducing the legal obstacles faced by MSMEs throughout their life cycle, in particular by MSMEs in developing economies. As agreed at its forty-sixth session in 2013, the Commission reiterated that such work should begin with a focus on the legal questions surrounding the simplification of incorporation.[8]

II. Organization of the session

4. Working Group I, which was composed of all States members of the Commission, held its twenty-third session in Vienna from 17-21 November 2014. The session was attended by representatives of the following States Members of the Working Group: Argentina, Brazil, Canada, China, Colombia, Croatia, Ecuador, El Salvador, France, Germany, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Namibia, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, 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: Belgium, Bolivia (Plurinational State of), Burkina Faso, Chile, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Libya, Peru, Romania and Saudi Arabia.

6. The session was attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: United Nations Industrial Development Organization (UNIDO), World Bank (WB);

(b) *Invited intergovernmental organizations*: Eurasian Economic Commission (EEC), International Centre for Promotion of Enterprises (ICPE);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students' Association (ELSA), Fondacion pour le droit continental, Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT).

8. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Omer Cagri Ozdemir (Turkey)

9. In addition to the documents presented at its previous session, the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.84);

(b) A note by the Secretariat concerning best practices in business registration (A/CN.9/WG.I/WP.85);

(c) A note by the Secretariat on the legal questions surrounding the simplification of incorporation (A/CN.9/WG.I/WP.86);

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[6] Ibid., para. 65.
[7] Ibid.
[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

(d) A note by the Secretariat containing a draft model law on a single-member business entity (A/CN.9/WG.I/WP.86/Add.1); and

(e) The observations by the Government of Italy and the Government of France on possible alternative models for micro and small business (A/CN.9/WG.I/WP.87).

10. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Legal issues surrounding the simplification of incorporation).

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the legal issues surrounding the simplification of incorporation and related matters on the basis of documents presented at its previous session and Secretariat documents A/CN.9/WG.I/WP.85, A/CN.9/WG.I/WP.86, and A/CN.9/WG.I/WP.86/Add.1, as well as the observations of the Government of Italy and the Government of France in document A/CN.9/WG.I/WP.87. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises

A. Best practices in business registration

12. The Working Group first considered the issues outlined in document A/CN.9/WG.I/WP.85 on best practices in respect of business registration, which was prepared in response to a request by the Working Group at its twenty-second session, in February 2014.[9] The Secretariat highlighted certain aspects of the paper, which focused primarily on business registration issues in the context of MSMEs and made particular reference to two publications by the World Bank Group providing a wealth of data on business registration and MSMEs.[10]

13. Document A/CN.9/WG.I/WP.85 noted broad recognition amongst experts of the importance of business registration for entrepreneurs, markets and governments. Despite there being different models of organization or different levels of complexity of business registries, it was nonetheless possible to identify the following core functions: checking for the uniqueness of a business name; enrolment in a public commercial registry and registration with tax authorities.

14. Several best practices generated by the wave of reforms of business registration since the early 2000s were noted in document A/CN.9/WG.I/WP.85. They included: charging a fixed nominal registration fee, using standard registration forms and stipulating nominal (or no) paid-in minimum capital, assigning unique identification numbers and adopting information technology to facilitate the delivery of a range of business start-up services,

[9] A/CN.9/800, para. 49.

[10] Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis (July 2012), available at: www.brreg.no/internasjonalt/ISBER_Web.pdf, and Reforming Business Registration: A Toolkit for the Practitioners (January 2013), available at: www.wbginvestmentclimate.org/publications/loader.cfm?csModule=security/getfile&pageid=34841.

minimizing judicial involvement in registration and making the use of notaries, lawyers and registration intermediaries optional, providing information on the registration process, developing single interfaces for business registration (i.e. one-stop shops) and making public the registered information.

15. As noted in A/CN.9/WG.I/WP.85, the best practices noted above usually required reform of a State's legislative or institutional framework, or of the operating procedures of the business itself. Sometimes all three areas needed to be reformed. The experience of different international organizations that were particularly active since the beginning of the last decade in providing support to State reforms in these areas was also referred to as a source for lessons learned.

16. It was highlighted in document A/CN.9/WG.I/WP.85 that a domestic legal framework that was transparent and accountable, provided flexible legal forms and general objectives clauses for business entities, provided for low or no minimum capital requirements, optional use of notaries, lawyers and registration intermediaries, a declaratory system and clarity of the law was particularly conducive to the creation of an improved business registration system.

17. As indicated in A/CN.9/WG.I/WP.85, the best practices noted could respond more to the needs of small and medium-sized enterprises than to those of micro-businesses. In addition, a recent study noted that many small-scale enterprises operating informally in developing countries remained informal despite efforts to simplify and lower the costs of business registration processes. Both issues were drawn to the attention of the Working Group for possible consideration in its discussion on further work in the area of business registration.

18. The Working Group heard a presentation [11] by Mr. T. Moss, [12] President of the Corporate Registers Forum (CRF) and Chief Executive and Registrar of Companies for England and Wales, on CRF activities and on business registration practices in the United Kingdom. CRF was introduced as a global forum where members could exchange experiences and information on the present and future operation of corporate business registration systems.[13] Two examples were mentioned highlighting improvements resulting from reforms of domestic business registration systems. Lessons learned from the reforms processes were said to be, among others: leading from the top and obtaining commitment from all agencies involved; engaging in legal reform at an early stage; ensuring transparency; and reviewing and challenging thinking, processes and procedures.

19. The experience of the United Kingdom business registration system was also presented and it was stressed that the function of business registries was not only to collect information, but also to facilitate access to such information by all interested users. The system was defined as one based on a strong flexible legal framework, ease of compliance, integrity and quality of information, low cost for incorporation, and easy and fast access to data, all of which aimed to ensure excellent corporate transparency. Knowledge of the customer (in particular of their corporate structure) and of the registry's user needs were also highlighted as key elements of an effective system. In particular, it was noted that it was crucial to obtain easy access to accurate information from many different national registries particularly in the case of large companies that were often structured as networks of smaller companies located in different parts of the world. Making data available to users in multiple ways (for instance, individual data, bulk data, machine to machine data) and providing low or no-cost data were other key aspects of an effective business registration system. This approach was said to assist in supporting a country's economic growth, as it responded to the need of traders and potential traders to have the most accurate information possible on business partners, suppliers and creditors.

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[11] All presentations by experts invited to the twenty-third session of Working Group I may be found on the UNCITRAL website at www.uncitral.org/uncitral/en/data/whats_new/2014_11_working_group_I_presentations.html.

[12] Mr. Moss' presentation may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Moss-Best_practice_in_business_registration.pdf.

[13] The CRF has currently members from 50 jurisdictions representing the 5 continents.

20. The Working Group also heard a presentation by Mr. R. Dun,[14] Chairman of the Board at the European Business Register (EBR) and Manager of the International Relations Business Register at the Netherlands Chamber of Commerce. EBR is an association of national business registers that functions as a one-stop shop to access company information, and covers a total of 28 countries from the European Union (EU) and other European countries outside the EU.

21. EBR was introduced as an early example of cooperation among business registers in Europe, being established in 1992 and later followed by several other initiatives, including the EU BRITE (Business Register Interoperability Throughout Europe) project (2006-2009), that provided the basis for the EU Green Paper (2009) and the EU Directive 2012/17, which aimed to establish a system for the interconnection of business registers. The Green Paper focused on two topics: access to information (particularly in the context of a network of business registers) and cooperation of business registers in cross-border procedures.

22. The role of EU Directive 2012/17 in creating an environment conducive to business registration was particularly emphasized, as companies with their place of business in EU Member States were increasingly conducting business beyond national borders. Pursuant to the Directive, EU Member States were requested to enable electronic communication between business registers and transmit information to individual users in a standardized way, by means of identical content and interoperable technologies throughout the EU. Unique identifiers ensured that information was distributed from each of the Member States' registers to the competent registers of other Member States in a standard message format.

23. The registration system of the Netherlands was also presented. The domestic legislative framework provided for mandatory registration of all relevant economic entities, including sole traders, associations, foundations, government bodies and churches. This approach was aimed at promoting legal certainty in the economy; disseminating factual data to advance economic interests of businesses and ensure registration of all companies and legal persons to enhance government efficiency. The system, formerly sustained through an annual registration fee, was currently supported by government funding and information fees.

24. The Working Group further heard a presentation by Mr. V. Giannella,[15] Member of the Board of the European Commerce Register's Forum (ECRF) and International Affairs Manager at Infocamere, Italy, on the results of the 2014 International Business Registers Report.[16] The Report was based on a survey of 73 organizations dealing with business registration, representing four different geographic regions (Asia-Pacific; Africa and Middle East; Europe and the Americas). The Report, which is an annual survey, included a number of findings in respect of: the most popular organizational model for business registries; pre-registration activities; the use of e-systems; sources of funding and fees; and global patterns of business dynamics (terminations and incorporations).

25. Information was provided on Italy's experience with the adoption of an electronic business registration system, which completely replaced the former paper-based system. The Italian business register contained legally-required information relating to business start-up, as well as to changes occurring after registration, of all types of enterprises regardless of their legal status and the economic sector in which they operated. The interconnected character of the registry was stressed, as data from other relevant registries could be accessed. It was also highlighted that through the system, users were allowed to register with several other government agencies, such as tax authorities and social security. The new "registered electronic mail", a mandatory requirement since 2013 for all types of companies, permitted the electronic exchange of all necessary information between the Public Administration and users.

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[14] Mr. Dunn's presentations may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Dun-European_business_register.pdf and at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Dun-European_cooperation_business_registers.pdf.

[15] Mr. Giannella's presentation may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Giannella-ECRF_2014.pdf.

[16] The Report is available at www.ecrforum.org.

B. Questions posed by the Working Group

26. In light of the presentations given by the invited experts as outlined above, the following paragraphs summarize questions posed by the Working Group and responses received from the experts.

27. *In noting that the law should fit the culture and circumstances of a broad range of States, and in light of recently highlighted anti-corruption efforts by the G20, were business registers trying to improve verification and cross-referral of information with other authorities?* In response, it was noted that a registry must strike a careful balance between creating the conditions to ease the doing of business and to minimize the risk of money-laundering, fraud and similar behaviour. In seeking to establish this balance, some States provided for verification prior to registration; others provided for its post-registration, preferring to facilitate transparency, openness, ease of doing business and speed of access to information, while relying on the correction of any aberrant or fraudulent behaviour after the information had been posted online. In doing so, close contacts were maintained with law enforcement agencies and users of the business registry, and it was observed that, in fact, the number of corrections required was quite small in comparison with the overall number of registrations. However, it was noted that both systems had advantages and disadvantages associated with them and that the quality and reliability of the information in the register was of paramount importance.

28. *How could online business registration provide for adequate authentication of the founders of the business?* It was observed that where a notary, lawyer or registration intermediary was required for business registration, the notary, lawyer or registration intermediary would communicate with the register electronically in a manner that was recognized by way of a digital certificate provided to that person. Where registration was by a sole trader and no notary, lawyer or registration intermediary was required, strong authentication was used when delivering the digital certificate of registration.

29. *Did business registers keep statistics based on different sizes of companies?* It was noted in response that such information was available, but that most companies in the United Kingdom register were small businesses, and that fewer than 5 per cent of businesses registered in the Netherlands were large. However, it was observed that the basic information requirements for all sizes of companies was the same except that larger, more complex businesses were required to file more information than smaller ones, and that the legal form of the business dictated the information obligations that had to be fulfilled.

30. *Would it be useful to business registers to have certain principles reflected in a model law or regulations, and does the provision of information assist in cross-border trade?* It was noted that any legal text in this regard should contain the essence of what constitutes a company, i.e. directors, shareholders, a statement of share capital and the location of the entity, and that such information should then be built upon for registration purposes. In any event, the goal was transparency of, and open access to, the information, regardless of whether it was for domestic or international trade.

31. *How many SMEs have gone bankrupt and what percentage of them has lasted more than one year? What is the definition of SME in the experts' domestic law? What is the comparative price of obtaining extracts from the registries?* Precise information on the number of SME bankruptcies was not immediately available, but it was observed that the more relevant figure from the perspective of registers was the number of businesses that were removed annually, and that of that number, approximately half did so voluntarily while the other half were removed for no longer meeting the requirements. In addition, over 90 per cent of SMEs were still on the register one year after their registration. Finally, various definitions of SMEs were noted, while the price of obtaining extracts of information ranged from 11 euros for a paper copy to soon-to-be free of charge.

32. *Should company law require a general objectives clause or a specific business purpose clause?* It was noted that the legal regimes on this point varied and that the requirement for a general or specific purpose clause depended on the legal type of the business being founded. In those regimes, like Italy and the Netherlands, that required a specific purpose clause, the content of the clause would be translated into information usable for additional searches and statistical classifications of types of business.

33. *Was there any specific evidence suggesting that the amount of the fee for business registration would influence the number of companies registered?* It was observed that whether or not the amount of the business registration fee would present a barrier to registration for a business would depend on the calculation made by the business and its motivation to register. However, it was noted that the amount of the fee did play a role in that decision.

34. *It was observed that the registration requirements of companies should be differentiated depending on their size and that business registration was linked to tax liability, which should also be adjusted for size. It was further noted that the company register was but one part of the system, and that other elements affecting MSMEs needed to be considered such as the tax authority, credit rating agencies, banks and other intermediaries.* It was observed that in Finland, a new company filed its information in all relevant registers at the same time, and was provided a unique identifier for all purposes, which was then tied to publicly available information. In States, like the United Kingdom, that did not have a unified system for registration for all purposes, the primary purpose of the registry was to provide the basic information on a company, which could then be built upon by other sources. In addition, in the Netherlands, most companies were MSMEs but all companies were treated similarly, including in terms of requiring paperless registration, except in certain cases in respect of the publication and accounting requirements for the few very large companies. It was also noted that obtaining a license was also a key requirement for businesses, and particularly relevant in the context of developing countries.

35. *Were specific benefits open to women who owned MSMEs; were there limits to the number of times that a founder could close a company and open a new one; and was intellectual property linked to the business register?* In response it was observed that no specific benefits were open to women entrepreneurs; that there was no limit to the number of times that a founder could close or open a company; and that intellectual property was generally dealt with as a separate matter by another authority.

36. *Where were the rules for business registration typically found, i.e. in a State's business corporation statute or in other legislation?* The response to this question was said to vary, depending on the State, but that the relevant legislation in a number of different systems was available online at the World Bank website www.doingbusiness.org.

37. *If a sole trader were required to register, was the basis for that requirement to protect third parties or to conform with other regulations such as tax enforcement?* It was observed that in the United Kingdom, sole traders need only register with the tax authority; they would have no disclosure requirements, nor recourse to limited liability. In the Netherlands, however, sole traders were registered in the same manner as all other businesses so as to be able to identify them and locate information pertaining to them.

38. *In cases where a State's business registration system was amended to incorporate a single interface for business registration, how were companies registered under the old system migrated to the new one?* It was noted that in most cases, the reforms made to a system have been evolutionary, but that in other cases, the companies from the old system were required to register in the new system, and still other instances, the business register converted the paper files into electronic data. In cases where there was no single interface, the business register typically worked very closely with tax and other relevant authorities.

C. Future work in the area of business registration

1. Issues to be considered

39. Further to the presentations on business registration systems by the invited experts and the discussion on registration practices in paragraphs 18 to 38 above, the Working Group continued to explore the issue of business registration, particularly: (a) whether the best practices for business registration outlined in A/CN.9/WG.I/WP.85 were sufficient to meet the needs of micro-businesses; (b) whether work by UNCITRAL could add value to the existing work in this area without duplicating the efforts and achievements of other organizations; and (c) the form such work might take.

40. The Working Group expressed its general support for the view that the best practices in business registration presented in the Secretariat's document would meet the needs of micro-businesses. Several delegations also emphasized the importance for the Working Group to address such a topic, and it was observed that business registration was in fact part of the lifecycle of MSMEs. It was further noted that although in many jurisdictions there was no need for micro-businesses (most of which are sole traders) to register, in others, mandatory registration of all businesses was required. In any event, growth of the business from that of a sole trader to a larger enterprise or corporate vehicle would likely require registration in most jurisdictions as a matter of public policy.

41. A view was expressed that it may not be necessary for the Working Group to address business registration, as several studies, toolkits and other documents were available for States wishing to embark on a reform process in this area. The Working Group should thus defer to other international organizations, such as the World Bank, which were active in providing technical assistance to States' reforms in this field and which had developed extensive experience. Another view highlighted that it was important to stress the distinction between business registration, which was largely an administrative process disciplined through secondary legislation, and registration as a means of incorporating a business, which was regulated by law in most countries.

42. It was further suggested that rather than differentiating at this stage between sole traders and more complex business forms, the Working Group may wish to take an approach focusing on the general application of principles to all businesses, with a view to later considering any necessary exceptions or tailoring of the approach to the local context. There was support for that view as representing an appropriately flexible approach.

2. Content and form of possible future work on business registration

43. The Working Group expressed its general support for the view that while A/CN.9/WG.I/WP.85 provided a good starting point for further discussion on the topic, any future legislative text on business registration should use that text to draw out the principles on which registration should be based. In addition, it was suggested that further work on registration should ensure that a balanced approach was taken in terms of those systems where registration was a judicial process and of the relevant principles that inspired those systems. It was proposed that guiding principles on company registration could be prepared for States as well as draft articles based on those principles which States could incorporate in their domestic law.

44. The view was expressed that regardless of the type of text prepared, it should respond to the needs of developing countries for an instrument that would provide the main legislative components for business registration, but that could also be adjusted to meet the domestic context. It was noted by several delegations that a legislative guide could contain a balanced approach and ensure the necessary flexibility for legislative reform of business registration systems, accommodating the needs of developing countries, as well as the requirements of States wishing to improve their business registration system through the adoption of certain best practices, without undertaking major reforms.

45. There was general support for the view that a decision on what form a text on business registration should take could best be made after the Working Group had identified and discussed the principles supporting business registration.

46. After discussion, the Working Group agreed to continue its work on business registration, using A/CN.9/WG.I/WP.85 as a basis to more deeply explore the issues and to consider the distillation of principles. In this connection, parts IV (Best practices in business registration, paras. 18-47) and V (Reforms underpinning business registration, paras. 48-60) of A/CN.9/WG.I/WP.85 were thought to be most relevant. In addition, it was suggested that the work could also consider: (a) the advantages and limitations of different business registration models (i.e. declaratory model and the judicial based model); (b) any necessary definitions; (c) any items listed in paragraph 3 that have not already been included in the text, such as the identification of the minimum information necessary to register; and (d) the issues raised in footnote 26 of document A/CN.9/WG.I/WP.85.

D. Issues in respect of transparency and beneficial ownership: FATF standards

47. The Working Group heard a presentation by Mr. T. Goodrick,[17] from the Financial Action Task Force (FATF) secretariat, on FATF's standard-setting activity to promote effective implementation of legal, regulatory and operational measures for combating money-laundering, terrorist financing and other illicit purposes.[18] It was noted that such standards had been endorsed by over 190 States.

48. The presentation highlighted that while corporate vehicles played an essential role in the global economy, they could also facilitate the use of proceeds of crime if transparency was not ensured when an entity was established and/or in the entity structure and governance. Shell companies, complex structures, intermediaries and nominees were said to be examples of techniques used to obscure information on beneficial ownership of corporate vehicles. It was noted that information on legal and beneficial ownership could assist law enforcement and other competent authorities in identifying those natural persons who were responsible for the underlying activity of the entity.

49. In order to assist States in facilitating collection of such information and preventing the misuse of corporate vehicles, FATF had developed a series of recommendations which were intended to be of universal application. In particular, Recommendation 24[19] required States to conduct comprehensive risk assessments of legal persons and to ensure that all companies were registered in a publicly available company registry. The basic information required was: (a) the company name; (b) proof of incorporation; (c) legal form and status; (d) the address of the registered office; (e) its basic regulating powers; and (d) a list of directors. In addition, companies were required to keep a record of their shareholders or members.

50. It was noted that the fundamental requirement of Recommendation 24 was that countries should make available adequate, accurate and timely information on the beneficial ownership of all legal persons, and that public authorities should be able to access such information in a timely manner. Beneficial owners were said to be the natural person(s) who ultimately owned or controlled the legal person either through their ownership interests, through positions held within the legal person or through other means. Further, Recommendation 24 permitted States to adopt different mechanisms to collect information according to their legal, regulatory, economic and cultural characteristics. Additional measures required of States were to ensure controls on bearer shares and nominee shareholders; to establish effective, proportionate and dissuasive sanctions for non-compliance; and to engage in international cooperation to facilitate the exchange of information, particularly through electronic business registries.

51. Other FATF standards which played an important role in preventing misuse of corporate vehicles were mentioned, including standards[20] requiring financial institutions, lawyers and trust and company service providers to undertake customer due diligence. Moreover, it was noted that emerging best practices were to digitize and maintain registered information in electronic form.

52. In order to assist States facing significant challenges in the implementation of the provisions of the FATF standards and to identify, design and implement appropriate measures in accordance with the requirements of the recommendations, FATF recently

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[17] Mr. Goodrick's presentation may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Goodrick-Preventing_misuse_of_corporate_vehicles.pdf.

[18] The Financial Action Task Force (FATF) is an intergovernmental body established in 1989 by the Ministers of its Member jurisdictions, currently comprising 34 jurisdiction and 2 regional organizations, representing most major financial centres in all parts of the globe. Further information is available at www.fatf-gafi.org/.

[19] International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, Recommendation 24 (www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

[20] Ibid., Recommendations 10 and 22.

developed a guidance paper directed at policymakers and practitioners in national authorities.[21]

53. Other global initiatives to prevent misuse of corporate vehicles were mentioned. They included the G8 Action Plan Principles to prevent the misuse of companies and legal arrangements; the G20 work on high-level principles on beneficial ownership transparency; the World Bank/UNODC StAR Initiative; and OECD taxation initiatives such as the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes and Common Reporting Standard.

54. The FATF representative was of the view that in light of the FATF standards, the Working Group might wish to consider issues such as the collection of sufficient information by the company registry; measures to ensure that information was accurate and current; and the facilitation of timely access to information.

55. General observations and questions were made by the Working Group in respect of the issues outlined by the invited expert which better clarified certain aspects of the FATF standards. In particular, it was highlighted that as far as registration was concerned, FATF standards did not deal with issues of ex ante or ex post verification: these and measures to ensure compliance with the requirements of registration were left to the State. It was further noted that FATF standards could be applied to entities of all sizes in order to prevent criminal activities.

E. Possible alternative legislative models for micro and small businesses

56. It was recalled that at its twenty-second session (New York, 10-14 February 2014), the Working Group had invited delegations to submit information to it in respect of several domestic legislative models that had been described that provided for the segregation of business assets from personal assets without requiring the creation of an entity with legal personality.[22] In response to that invitation, document A/CN.9/WG.I/WP.87 was prepared, and the Governments of Italy and France presented the content of that document to the Working Group.

57. The delegation of Italy explained that the general rule in Italy was that debtors were required to satisfy their obligations with all present and future assets. However, some derogations from this principle by sole or multiparty business entities, as well as by individuals or companies, could be found in terms of separate capital funds and business network contracts as outlined in greater detail in A/CN.9/WG.I/WP.87. In each case, public registration in respect of the segregated funds was required.

58. In response to questions raised by the Working Group, the delegation of Italy explained that it had no specific data on the use of business network contracts by MSMEs, but that as of 1 July 2014, 1,643 of such contracts had been established, involving over 8,000 entrepreneurs. However, it was added that generally speaking, such instruments were thought to be of use mainly for micro and small businesses, while separate capital funds were more commonly used by larger companies.

59. The delegation of France observed that most French entrepreneurs were sole traders and that legal techniques had been established in France to tailor flexible rules adapted to the needs of sole traders. Sole traders and individual entrepreneurs were entitled to segregate personal and professional assets and to have simplified tax and social security opportunities, subject to certain options. A more recent innovation had been the establishment of an individual entrepreneur with limited liability (EIRL), which continued to exist in parallel with the single person limited liability enterprise (EURL). In addition, provision was also made in France for growth from single (SASU) to multi-person (SAS) companies under a single regime.

60. In response to questions raised by the Working Group, the delegation of France confirmed that the EIRL was a fiduciary technique in which the business person split its

[21] FATF Guidance on Transparency and Beneficial Ownership (October 2014) (www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf).

[22] A/CN.9/800, para. 46.

assets but did not create a separate legal entity, but explained that the attraction for business persons to do so was not cost-related, as the cost of registration under the different regimes was quite similar. Because the segregation of assets was publicly registered, third parties could access the information and assess their risk. Intermingling of personal and professional assets was avoided through the registration requirement and enforced by way of forfeiture of one's limited liability where the segregation of the assets was not respected. Moreover, it was suggested that consideration of the issues in an evolutionary manner, from the situation of sole traders through to their growth to medium-sized enterprises might be an appropriate way for the Working Group to proceed. In addition, it was confirmed that in France, insolvency law, which could result in reorganization or liquidation, applied to all enterprises, regardless of their size.

61. Several delegations expressed interest in exploring further how the mechanisms outlined by the French and Italian delegations could be used to further the efforts of the Working Group. In addition to presenting possible options outside of the limited liability model for the growth of sole traders into multi-person business entities, it was observed that the business network contract could be considered in the development of a cooperative type approach to support MSMEs. There was support in the Working Group for the view that, due to the fact that these mechanisms relied on public registration to notify third parties of their nature, they could be considered for possible inclusion in the revised text that would be prepared focusing on the issues in A/CN.9/WG.I/WP.85.

F. Legal questions surrounding the simplification of incorporation

1. Introduction

62. The Working Group next considered issues relating to simplified business entities or simplified companies. By way of introduction, the Secretariat noted that the Working Group had received a broad mandate from the Commission to prepare legal standards aimed at creating an enabling legal environment for MSMEs, with an initial focus on the legal issues surrounding the simplification of incorporation,[23] and observed that particularly in the case of early discussions on a new topic, the Working Group may wish to exercise care to avoid interpreting that mandate too strictly so as to avoid closing off an area of discussion that might be fruitful in the overall fulfilment of the goals intended to be achieved. The Secretariat noted that the Working Group had already expanded upon its original mandate by considering in such detail information in respect of business registration, and observed that the Commission exercised a supervisory role over the Working Group through the annual reporting system.

63. Some delegations disagreed with the characterization of the mandate of the Working Group concerning its starting point; they pointed out that the starting point for the work was simplified incorporation and registration and that mandate was derived from a proposal made by the Government of Colombia to the Commission at its forty-sixth session in 2013 to begin work on simplified business registration and incorporation.[24]

64. In order to assist in structuring the Working Group's consideration of this complex series of issues, the Secretariat provided an overview of the relevant documentation, focusing in particular on document A/CN.9/WG.I/WP.86, which was prepared as the primary document responding to the request of the Working Group at its previous session.[25] Touching upon three of the broad legal principles underpinning the law of business organizations (limited liability, legal personality and freedom of contract) set out in part IV of the document, the Secretariat referred the attention of the Working Group to part V of the paper as setting out a possible framework for the Working Group to continue its analysis. The framework was intended to outline in a logical but non-exhaustive fashion the main issues that the Working Group may wish to consider in its analysis. In addition, the

[23] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[24] The proposal of the Government of Colombia (A/CN.9/790), made at the Commission session in 2013, was co-sponsored by a number of delegations and broadly supported within the Commission.

[25] A/CN.9/800, para. 65.

Secretariat clarified that in order to illustrate the aspects noted in the framework, reference was made throughout the document to two possible examples of interest to the Working Group: the Model Act on the Simplified Corporation (MASC) contained in the annex to A/CN.9/WG.I/WP.83 and the draft model law on a single-member business entity (MLSBE) contained in A/CN.9/WG.I/WP.86/Add.1.

65. Finally, it was observed by the Secretariat that, as alluded to during the previous session of the Working Group,[26] efforts to achieve consensus on a common private company statute by a regional economic integration organization had not been successful and had ultimately been abandoned.[27] The Secretariat clarified that the MLSBE in document A/CN.9/WG.I/WP.86/Add.1 was not intended as the ultimate goal for the Working Group, but was rather intended as a manageable first step in what promised to be difficult discussions, with the goal of adding more complex provisions to accommodate multiple member business entities in the same model once consensus had been achieved on a single-member model.

2. Method of proceeding with the work

66. The Working Group next considered how best it should proceed with its work. A conference room paper (CRP) was introduced that was co-sponsored by a number of delegations and expressed the view that:

(a) The factors that should guide the work at its current session were:

(i) The previous decisions and the mandate of the Working Group focused on simplified business registration and incorporation of MSMEs in developing countries and not solely on micro-enterprises;

(ii) Simplified business registration and incorporation should enable micro and small businesses to grow and to graduate from a subsistence form of doing business to a growth mode characteristic of the formal sector;

(iii) An internationally-recognized form of business registration and incorporation focusing on MSMEs would facilitate cross-border trade for MSMEs operating in regional markets;

(iv) The mandate of the Working Group required it to take into account the experience of developing countries in completing its tasks;

(b) The MASC contained in the annex to A/CN.9/WG.I/WP.83 provided a useful template for developing a legal instrument in respect of MSMEs in developing countries and:

(i) Had served as a basis for legislative reform;

(ii) Addressed the key considerations for simplified business registration and incorporation, including (i) the possibility of one or more persons incorporating; (ii) full-fledged limited liability; (iii) simple registration and incorporation requirements; (iv) contractual flexibility; (v) supple organizational structure; (vi) optional minimum capital; (vii) no purpose requirement; (viii) optional use of intermediaries; and (ix) fiscal transparency and simplified accounting; and

(c) The legal text prepared by the Working Group should include international good practices for incorporation of MSMEs from developing and developed countries, and core elements for it should be drawn from the documents before the Working Group.

67. In addition, the Working Group heard another proposal that the non-exhaustive framework of issues outlined in part V of document A/CN.9/WG.I/WP.86 would constitute an appropriate outline through which it could consider the issues relevant to the preparation of a legal text on a simplified business entity. It was also proposed that the Working Group draw from documents A/CN.9/WG.I/WP.83 and A/CN.9/WG.I/WP.86/Add.1, as well as from other models from other States. After discussion, the Working Group strongly supported that proposal as an initial step. In addition, there was strong support in the

[26] Ibid., para. 35.
[27] A/CN.9/WG.I/WP.86, footnotes 9 and 11.

Working Group for consideration of a single legal text that could accommodate the evolution of a business entity from a single-member model to a more complex multi-member entity.

3. Framework for consideration of issues

General matters

Definition and the nature of the entity

68. The Working Group proceeded to explore the relevant issues as outlined in part V of document A/CN.9/WG.I/WP.86, commencing with a consideration of general matters that might be considered for the proposed legal text. There was broad agreement in the Working Group that definitions would be useful in the final version of the proposed legal text, but that it would not be possible to consider specific terms that would need to be defined prior to having finalized the text. It was noted that although MSMEs were categorized or defined by the authorities in their local economic context, the Working Group had decided at its previous session that it was not necessary to approach the issue of simplified business entities with specific company size in mind.[28] The Working Group confirmed that approach, but noted that it would be useful to establish what the scope of application of the legal text would be, for example, certain enterprises might be excluded from it, such as those from certain highly regulated sectors. However, there was agreement that the text should reflect the nature of MSMEs (which could include a diverse group of types of entrepreneur) and their need for support to establish themselves and thrive. In addition, the Working Group agreed to use the terminology "simplified business entity", which was described as a neutral term, or "simplified company" in its consideration of the issues.

69. Discussion in the Working Group next turned to the issue of the nature of the business entity, as well as how the nature of that business entity should be reflected in its name in order to provide notice to third parties. There was broad agreement in the Working Group that the entity should enjoy limited liability, and that the entity should be a "commercial" privately held entity, but not designated as "for profit", so as to avoiding uncertainty concerning the meaning of "for profit" and to ensure a broad possible scope, which could include cooperatives and funds. It was observed that States could decide on an individual basis whether to extend the scope of the text to the non-profit sector. As far as whether or not a particular suffix should be attached to the name of the business entity to alert third parties of its nature, it was suggested that a common suffix, perhaps one that was newly created, could assist in uniformity and cross-border recognition of the entity. However, it was observed that that could be difficult to achieve in practice given different language traditions around the world, the fact that it would be important for the suffix to be recognizable in the local commerce sector, and the fact that there would be different levels of uptake of the instrument by States. Instead, it was thought that it would be preferable for the instrument to recommend that a State should use a distinguishable suffix for the business entity, but that the State could choose its own term based on domestic circumstances, provided that, for example, it indicated that the enterprise was a simplified business entity and that it enjoyed limited liability.

Purpose clause

70. The Working Group engaged in an exchange of views in respect of purpose clauses. It was observed that purpose clauses were primarily found in States that had adopted certain common law traditions and that the intent of a specific purpose clause was a matter of agency, in that it signalled the limits of authority of the manager of the business entity: contracts entered into for purposes outside of the stated purpose might not be valid. It was also thought that purpose clauses — even general ones — could provide useful public information on the nature of the enterprise; however, it was further noted that purpose clauses could be used to anti-competitive effect. After discussion of a number of different national approaches and the increasing trend toward broad purpose clauses in States that required them, it was agreed that the purpose clause, if any, of the simplified business entity should be broad so as to provide maximum flexibility for MSMEs. It was also noted that in multiple jurisdictions, a layer of regulatory, licensing, permit and inspection regimes prescribed and regulated the

[28] A/CN.9/800, para. 24.

business activities of MSMEs in the same way as the specific purpose clause in the articles of association.

Legal personality and limited liability

71. The Working Group recalled that it had agreed earlier in the session (see para. 69 above) that in order to assist MSMEs in their establishment and development it was key for the simplified entity established to enjoy limited liability. Moreover, the Working Group agreed that, while the concepts were linked, it was not necessary to establish legal personality in order to enjoy the benefit of limited liability, as evidenced by the domestic mechanisms outlined in document A/CN.9/WG.I/WP.87 and through presentations earlier in the session.

72. It was observed that "legal personality" could have different meanings in different States, for example, in the context of taxation, and there was some support in the Working Group for the suggestion that if the concept were to be included in the legal text on a simplified business entity, it might be best to set out its principles rather than using the actual term. The Working Group went on to consider whether it would be advisable for the simplified entity to possess legal personality even though the concept was not necessarily linked to the more imperative requirement of limited liability. Some support was expressed for the approach that legal personality was not a necessary element, that the business entity need not necessarily be a corporation, and that the proposed text should reflect a variety of possible models. In that vein, the Working Group was advised that ASEAN (the Association of Southeast Asian Nations) was striving for the goal of economic integration by 2015, and that it would be important for some States to keep all options open in the proposed text in order to maintain maximum flexibility in those discussions.

73. However, there was also support in the Working Group for the view that making provision for incorporation was a desired outcome of the work in order to provide for the full range of options for development to MSMEs from sole proprietorships to larger enterprises, and that legal personality was thus necessary. The Working Group was also made aware of the view that legal personality and the possibility of incorporation were considered to be important in some developing countries so as to provide the maximum possibility for growth for MSMEs.

74. In addition to reiterating its agreement that limited liability should be an element of the text prepared, the Working Group expressed its support for a single text that could accommodate the evolution of a business entity from a very small to a more complex multi-member entity. In terms of legal personality and the type of enterprise to focus on in the preparation of the text, the Working Group agreed that all options considered in its discussion should remain open for future exploration. With a view to enriching its discussions, the Working Group encouraged participation from developing countries of all regions of the world in order to better respond to global needs.

Minimum capital requirement and the protection of creditors and third parties

75. The Working Group recalled its discussion in respect of minimum capital requirements at its previous session.[29] As at its last session, while there was no consensus on whether or not minimum capital requirements were required to offset the provision of limited liability to an enterprise, there was broad agreement in the Working Group that the modern trend was to move away from minimum capital requirements. In addition, the Working Group heard a number of examples of States that had reduced the capital requirement for enterprises of all types to zero or to a nominal amount and have had successful outcomes in terms of increased business formalization with no apparent negative impact; the view was expressed that the positive impact of reducing or abolishing the minimum capital requirement would be even greater in the case of MSMEs. The Working Group was also reminded that some States took a progressive approach to their minimum capital requirement in order to account for the difficulties that smaller enterprises might have in meeting those requirements early in their life cycle. It was suggested that this flexibility in the treatment of smaller enterprises was a reflection of their nature, in that third parties dealing with such enterprises were more likely to have direct knowledge of the enterprise and its principals,

[29] A/CN.9/800, paras. 51 to 59.

such that they were not in need of protection, but that as the enterprise grew and perhaps commenced cross-border trading, the need for the protection of third parties increased accordingly.

76. The Working Group heard that the extent to which creditors of an enterprise required protection was unclear, since voluntary creditors were usually able to protect themselves via contractual mechanisms, while involuntary creditors may not be protected by capital requirements in any event. It was also noted that minimum capital could be withdrawn from an enterprise's bank account as soon as it was established, thus not providing any real protection for third parties, while enterprises with low or no minimum capital on establishment could, in fact, have a large capital influx post-establishment. It was further observed that in those States with a minimum capital requirement, enterprises were permitted to use that capital in the operation of their business. In addition, it was suggested that in the particular context of MSMEs, providing them with limited liability to protect their personal assets was of greater importance than requiring a more than nominal minimum capital protection, which could create a potential barrier to formalization. The Working Group also heard that having no capital requirements would not necessarily have an impact on the apportionment of rights and obligations in an enterprise, since the two issues were not necessarily linked.

77. The Working Group next considered means that could be used to protect creditors and third parties other than establishing greater than nominal minimum capital requirements. While the list of such possible mechanisms set out in paragraph 32 of document A/CN.9/WG.I/WP.86 was generally noted with approval, it was observed that all of the mechanisms listed were of an ex post rather than an ex ante character (like minimum capital requirements) which was an important distinction in some States, and that reliance on other sectors to provide third-party protection (through, for example, banking or licensing requirements) might not be sufficient. In addition, it was suggested that while the entire list was of interest, the first three mechanisms might be of particular importance in the context of MSMEs. The Working Group also heard suggestions for possible additions to the list of mechanisms, including requirements in respect of the transparency, quality and public availability of registered information on the business entity and its managers, as well as requirements that its business name not be misleading and that its name be set out in contracts, invoices and other dealings with third parties. Further protection of third parties could be obtained via specific requirements that the founders and managers of a business entity not be bankrupt, and that they be of legal age and sound mind.

78. The Working Group agreed that the issues of minimum capital requirement and protection of third parties should be treated under the general category of protection of creditors and other third parties. Although the Working Group did not agree on what such standards for the protection of creditors and third parties should be, there was agreement that the legal text contemplated for simplified business entities should provide sufficient flexibility for a State to choose its own criteria as it saw fit. It was further agreed that the list of measures presented in paragraph 32 of document A/CN.9/WG. I/WP.86 could be expanded to include other approaches for the protection of third parties, possibly including approaches beyond commercial or company law.

79. The Working Group agreed that it would resume its deliberations on document A/CN.9/WG.I/WP.86 at its next session, beginning from paragraph 34. Delegations were invited to submit comments as official documents.

V. Next sessions of the Working Group

80. The Working Group was reminded that its twenty-fourth session would be held from 13 to 17 April 2015 in New York, and that its twenty-fifth session was tentatively scheduled to be held from 12 to 16 October 2015 in Vienna.

B. Note by the Secretariat on best practices in business registration

A/CN.9/WG.I/WP.85

[Original: English]

Contents

I. Background

1. At its forty-sixth session in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle. The Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should initially focus on the legal questions surrounding the simplification of incorporation.[1]

2. At its twenty-second session (New York, 10-14 February 2014), Working Group I commenced its work in accordance with the mandate received from the Commission. The discussion of the Working Group at that session, reflected in document A/CN.9/800, took place on a preliminary basis, with the aim to delineate the direction the work could take and the issues relevant for discussion at the next sessions of the Working Group. Several topics were considered by the Working Group that could be included in possible legislative models aimed at the simplification of incorporation for MSMEs and there was agreement that the Working Group should give particular emphasis in its work to the importance of business registration. The Working Group noted that business registration was an important aspect in assisting MSMEs, particularly in the case of microenterprises that may wish to formalize but not to incorporate. Moreover, there was no need to distinguish between the treatment of enterprises based on size at the registration stage, provided that registration could be accomplished quickly and at a low cost. However, it was observed that registration might not necessarily be available to or desirable for all micro-businesses and single person entrepreneurs and that the Working Group should continue to consider additional measures that could help these businesses to formalize.[1]

3. After discussion, the Working Group requested the Secretariat to prepare a document for its next session in which best practices in respect of business registration would be considered by the Working Group. The following issues were highlighted as being relevant:

(a) Identification of the minimum information necessary to register;

(b) Establishment of a unique identification number for businesses, which would not conflict with global initiatives in this regard;

(c) Data protection and confidentiality;

(d) Ability to search for a unique business name;

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

(e) Easily-updated information;

(f) Identification of who would have access to the information, including credit institutions and the public;

(g) Consider interconnectivity among relevant authorities, including that information need only be provided once by the user;

(h) Low or no cost;

(i) Quickly accomplished;

(j) Minimal and simple procedures to follow;

(k) A record of the history of the business should be maintained;

(l) A standard model form should be provided electronically to the user and could possibly be used for the creation of company by-laws;

(m) Provide the user with the necessary means to conduct business, such as providing a tax identification number; and

(n) Provide proof of existence of the business.[1]

4. In response to that request, this note has been prepared to provide information on best practices in respect of business registration. It is mainly a review of publications written by international organizations particularly active in supporting business registration reform complemented by ad hoc information provided to the UNCITRAL Secretariat by some State delegations. Two publications of the World Bank Group[2] were particularly relevant as they include an analysis of best practices in respect of business registration in particular of MSMEs. They are: Innovative Solutions for Business Entry Reforms: A Global Analysis (July 2012)[3] and Reforming Business Registration: A Toolkit for the Practitioners (January 2013).[4] They will be referred to as "the Global Analysis (2012)" and "the Toolkit (2013)" in this Working Paper. Both publications are based on a wealth of data, including that collected by the *Doing Business Project* of the World Bank Group (hereinafter "Doing Business"),[5] which, until 2013, recorded 368 business registration reforms in 149 countries in the previous 8 years.[6]

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[1] A/CN.9/800, para. 49.

[2] The publications were prepared by the Investment Climate Advisory Services, a department of the World Bank Group supporting governments that implement reforms to improve their business environments thanks to funds provided by the World Bank Group (International Finance Corporation, the World Bank, and Multilateral Investment Guarantee Agency) and donor partners. Information is available at www.wbginvestmentclimate.org/index.cfm.

[3] Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, is based, among other sources, on a 2011 survey of 41 business registries, case studies undertaken in the Former Yugoslav Republic of Macedonia, Italy, Viet Nam, and Norway, and the 2011 World Bank Group study of ICT solutions in 34 company registers. The publication is available at: www.brreg.no/internasjonalt/ISBER_Web.pdf.

[4] Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the Practitioners, 2013, includes case studies of Azerbaijan, Bangladesh, Macedonia, New Zealand and South Sudan. The publication is available at: www.wbginvestmentclimate.org/publications/loader.cfm?csModule=security/getfile&pageid=34841.

[5] The Doing Business Project was launched in 2002 by the World Bank Group and looks at domestic small and medium-size companies, across 189 economies and selected cities at the subnational and regional level, in order to measure the regulations applying to those companies through their life cycle. The Doing Business is available online at www.doingbusiness.org/.

[6] See, World Bank Group Doing Business 2013, page 57. The Doing Business 2014 records 244 business registration reforms in 135 countries in the previous 5 years.

II. Business registration: a key element of an enabling business environment

5. As also noted at the twenty-second session of the Working Group, in February 2014, there is wide recognition among experts of the importance of business registration for entrepreneurs, markets and governments. Registration can assist micro-businesses to raise shared capital, obtain financing and access to government assistance programmes such as subsidies and reduced-cost services, and reassure business partners that the information provided about the business can be trusted. Benefits for governments are said to include: consistency of business with the domestic legal framework, improved tax collection, minimized risk for the public of potentially dubious businesses, creation of legal entities which can be easily identified with their own sets of rights and responsibilities, and provision of key information for the government on sectors, size, and ownership of enterprises.[7]

6. The complexity of business registration varies widely across countries, but three core functions[8] are considered to be common to all systems: (1) checking for the uniqueness of a business name, (2) enrolment in a public commercial registry, and (3) registration with tax authorities. These functions contribute to making a business registry an important information repository for the business community. Factors that affect the complexity of registration may include, among others, the level of development of the State and the State's legal traditions. Studies have highlighted that more developed countries tend to regulate less and instead rely on a firmly established legal system to govern business behaviour, while in contrast, many developing countries and economies in transition carry out significant ex ante screening of businesses.[9] The State's legal system — whether common law or civil law — may also play a role in how the registry system is organized. For instance, in some civil law jurisdictions, business registration is a judicial function, usually specified as such in the law governing the judiciary, while in most common law jurisdictions the business registry is a government department staffed by civil servants. It has been noted that these latter jurisdictions may require fewer procedural steps for business start-ups than civil law jurisdictions.[10]

7. Regardless of their legal tradition, many States still maintain obligations and requirements that make business registration difficult and entail substantial costs for their economy. It has been suggested that such strict business registration systems are conducive to consumer protection; only those businesses with a solid structure and with high quality products are likely to enter the market, thus reducing market failures and the risk that consumers buy from unreliable operators.[11] However, it has been noted that States with such entry barriers may lack the capacity to enforce them, which results in enabling informal firms to sell goods and services without meeting quality standards, possibly harming consumer welfare.[12] Another view maintains that stricter business entry systems inhibit the entry of new businesses, which leads to limited competition and high protection for incumbent firms, and results in higher profits for incumbents. According to a third view, strict business entry regulation may benefit public officials, who may use it to create and perpetuate rents through votes and bribes.[13] This would encourage corruption and undermine transparency and political will for reform, thus resulting in strong opposition to business registration and other regulatory reforms by officials and beneficiaries of the status quo.[14]

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[7] L. de Sa, Business Registration Start-Up: A concept note, International Finance Corporation and the World Bank, 2005, page 3.

[8] It has been observed that the three core functions noted here are mainly of an administrative nature, and that business registries may also perform certain legal and commercial functions. See below, footnote 26.

[9] World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 2.

[10] Ibid., page 75.

[11] See S. Djankov, The Regulation of Entry: A Survey, 2009, page 184.

[12] Supra, footnote 5, page 5.

[13] Supra, footnote 12, pages 184 ff.

[14] Supra, footnote 5, page 5.

8. Recognizing that easier business start-up is instrumental to improved competitiveness, in the early 2000s several members of the Organization for Economic Cooperation and Development (OECD) commenced reforms to streamline business registration and make it more efficient. Various middle income and developing economies followed the same path at the end of the 2000s. Key to these reforms were the need to promote business formalization and the fact that business registration reform is relatively easier and less costly than other reforms aiming at improving the legal environment for MSMEs. Studies have documented that faster and simpler procedures to start a business are conducive to business formalization. Economies with high registration costs or where a large number of days are required to start a business usually have a lower number of formal MSMEs and a larger informal sector.[15] According to available examples, improvements in the registration process are likely to have a positive influence on company creation. For instance, in one State simplification of business registration procedures resulted in a 77 per cent increase in registered businesses in the year following the reform.[16] In another country reducing registration fees in response to the economic crisis led to an increase by 15.8 per cent of new business registrations one year later.[17] According to another set of data, cutting registration costs from the seventy-fifth to the twenty-fifth percentile is associated with a ten to eleven per cent increase in the number of new firms.[18] In addition, business registration reforms seem to raise standards of efficiency and transparency for government agencies.[19]

9. In order to be effective, business registration reforms, while informed by international best practices, cannot ignore each State's level of development and priorities, nor its legal framework. For instance, the Global Analysis (2012) has noted that in countries with large informal economies, a reform with a narrow focus, at least in the beginning, might be more effective than a broader one, which could be introduced at a later stage.[20] If the main objective is formalization of the economy, simple solutions addressing the needs of MSMEs operating at the local level may be more successful than high-tech solutions that are more appropriate to larger businesses and/or businesses operating in the international market. In terms of legal framework, it has been observed that in States where ex ante verification of legal requirements and authorizations before businesses can register are required, notaries and the judiciary perform a key role in the registration process (see also para. 6 above). As country examples show, establishing an administrative registration system (where the services of judiciary and notaries are not required or are made optional) may thus prove a lengthy and contentious process.[21] It has been noted that, in contrast, States with a codified legal system that has been influenced by common law often provide for a declaratory business registration where no ex ante approval is required before business start-up and where registration is an administrative process.[22] These systems are said to be easier to reform, since the reform will not challenge the structure of the system, but rather focus on improving performance through simplification and automation.[23]

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[15] International Finance Corporation, Micro, Small, and Medium Enterprises: A Collection of Published Data, 2006. See also, World Bank, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams 2006.

[16] See Rwanda, supra, footnote 5, page 1.

[17] Malaysia, See World Bank Group, Doing Business 2011, page 24.

[18] Supra, footnote 5, page 1.

[19] Supra, footnote 8, page 4.

[20] Supra, footnote 4, page 26. See also footnote 26 below.

[21] Small and Medium Enterprise Department (World Bank Group), Reforming Business Registration Regulatory Procedures at the National Level, 2006, page 7.

[22] Supra, footnote 4, pages 25-26.

[23] Supra, footnote 10, page 75.

III. Organization and functions of business registries

10. According to a recent survey, the most popular organizational model for business registries in the States examined is based on oversight by the government (all respondents in Africa, the Middle East and the Asia-Pacific, as well as most respondents in the Americas, indicated that this was the case), while the second most common type is based on oversight by the judiciary (mainly in Europe).[24] Despite different models of organization or levels of complexity, however, business registries perform similar core functions as mentioned in paragraph 6 above.[25] A short description of these functions may be helpful in understanding the goals and the impact of reforms aimed at simplifying business registration processes.

A. Business start-up

11. The entry point of business registries in the establishment of start-ups is usually the support provided to entrepreneurs in choosing a unique name for their business. Registries may have a separate procedure (optional or mandatory) to assist the entrepreneur at this stage or may provide name searches as an information service. Since the business name must not be used by other businesses, registries may offer a name reservation service, either as a separate procedure (optional or mandatory) or as one integrated into the registration procedure.

12. Business registries provide forms (paper or electronic) and guidance in various ways to entrepreneurs preparing the application and other necessary documents for registration. Once the application is submitted, a registry performs a series of controls to ensure that all the necessary information and documents are included. In particular, a registry verifies the chosen business name as well as the requirements established in the State's legislation, such as the legal capacity of the entrepreneur to operate the business. Certain legislation requires the registry to perform simple controls (e.g. establishing that the name of the business is unique), while others may require more thorough verification, such as ensuring that the business name does not violate any trademark requirement.[26]

13. Payment of a registration fee must usually be made before the registration is completed, at which point the registry issues a certificate that confirms the registration and contains information about the business. Since information contained in the registration (the "registered information") must be disclosed to interested parties, registries make it publicly available through various means, including publication on a website, or in publications like the National Gazette or newspapers (although the trend is away from this latter approach). Registries may offer as an

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[24] European Commerce Registers' Forum [supported by], International Business Registers Report 2014, page 14 ff. The publication notes that some results of the survey are completely opposite to those of the previous year, due to some countries changing their answers, but also due to a change in the respondents.

[25] It has been suggested that these functions are mainly administrative. In addition to such administrative functions (such as issuance of a unique identifier or information-sharing), it has been observed that business registries in some States, particularly those with ex ante verification of information provided during business registration, may also perform certain legally-required functions (such as verification of information as a prerequisite to obtaining corporate legal personality) and, arguably, certain commercial functions (such as reducing transaction costs and preventing disputes within the company and with third parties through ensuring reliable and authentic publicly available company information). However, it should be observed that most States, even those using an ex post verification system, legally require the submission of accurate information to the registry. In such States, as in the case of States with a large informal economy (see para. 9 above), a reform with a more narrow focus, such as on administrative functions, might also be more effective at the outset than one with a broader focus. See, also, the discussion in
para. 6 above.

[26] Supra, footnote 4, page 8.

additional service subscriptions to announcements of certain kinds of registration, such as all new limited liability companies, or all new sole proprietors.[27]

14. Registered information made available to the public can include basic information about the business, like the telephone number and address, or more sophisticated information on the business structure, such as who is authorized to sign on the company's behalf or who serves as the company's legal representative.[28] Registered information has legal validity and by virtue of registration, all parties dealing with the business are deemed to have had notice of such information.[29]

B. Registration with other public authorities

15. A new business usually needs to register with several government agencies, which often require the same information gathered by the business registry. The business registry normally provides information on the necessary requirements to the entrepreneurs and refers them to the relevant agencies. In more modern systems, businesses may be assigned a registration number that also functions as a unique identifier that can be used in all of the business's interactions with government agencies, other businesses and banks (see paras. 31-35 below). This greatly simplifies business start-up since it allows the business registry to more easily exchange information with the other public institutions involved in the process. In some cases, business registries function as one-stop shops (see paras. 37 ff. below) to support registration with other authorities. The services operated by such outlets may include providing any necessary licensing, or they may simply provide information on the procedures to obtain licences and refer the entrepreneur to the relevant agency.

C. Businesses' life cycle

16. In addition to the function performed in the registration of a start-up, business registries typically support businesses throughout their life cycle. In many countries, entrepreneurs have a legal obligation to inform the registries of any changes occurring in the business, whether these are factual changes (e.g. address, telephone numbers) or whether they pertain to the structure of the business (e.g. a change of the legal representative). Information exchange between business registries and different government agencies also serves the same purpose. In some cases, registries publish annual accounts or financial statements that are useful for investors, clients, potential creditors and government agencies.

D. Deregistration: removal of a business from the register

17. Deregistration is defined as the removal of a business from the register once the business, for whatever reason, has permanently ceased to operate. The registry, upon receiving notification of the business dissolution, may issue an announcement stating that creditors have a certain length of time during which to advance their claims. After that period has passed, the business is removed from the register. This procedure ensures that businesses do not dissolve without providing creditors the opportunity to protect their rights.[30]

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[27] Ibid., page 9.

[28] The issue of beneficial ownership is to be noted in this regard. According to the International Business Registers Report 2014 (see pages 27 ff), which has surveyed jurisdictions from all over the world, only a small number of jurisdictions, among the respondents, currently register beneficial owner details. It is also common in most jurisdictions not to make beneficial owner details available to the public, although these data are made available to specific public authorities. See also the discussion on the transparency of beneficial ownership in A/CN.9/WG.I/WP82 paras. 26 ff.

[29] Supra, footnote 4, page 9.

[30] Ibid., pages 9-10.

IV. Best practices in business registration

18. The wave of reforms of business registration systems mentioned in paragraph 8 above has generated several best practices with similar features among the best performing countries.[31] These countries usually charge a fixed registration fee, use standard registration forms and stipulate nominal (or no) paid-in minimum capital, assign unique business identification numbers and adopt information technology to facilitate the delivery of a range of business start-up services. In some cases, these practices have been integrated with the creation of new company types with simplified entry requirements.[32]

A. Business registration and other fees

19. According to a recent survey, nearly all the respondent jurisdictions collect some fees for their services,[33] including those where registries are run by the government and receive public support. The Global Analysis (2012) indicates[34] that three types of fees are usually charged by registries: registration fees, fines and fees for information products. Such fees generate revenues for the registry, but they may also affect an entrepreneurs' decision to formalize. Registration fees are the most common practice and some countries consider them an actual revenue-generating mechanism, which may impose a heavy burden on new businesses. However, best practice countries follow the opposite approach. Since the government objective is to bring more companies into the formal sector and derive revenue from appropriate taxation of their legal operations, fees are set at a level that encourages businesses to formalize. Use of a flat fee schedule, regardless of the size of the business to register, is particularly common in these States. In some economies business registration is provided free of charge.[35]

20. Other fees charged by the registries include annual fees to keep a company in the registry (which are unrelated to any particular registration activity), and fees to register annual accounts or financial statements. A survey among business registries,[36] has shown that as many as 31 per cent of the respondents, including best performing countries, maintain annual fees, 88 per cent charge fees for registering amendments and 42 per cent impose fees for registering annual accounts. These practices, which seem to contradict the trend of minimizing revenue generation from registration, can clearly affect the businesses' decision to register or to maintain their registered status. It has thus been suggested that fees should be set following the principle of cost recovery (i.e. fees are meant to cover the administrative and operating cost of the registry), which is applied by best performing countries when determining fees for new registration. Such a principle is said to be more appropriate for a public service.

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[31] These countries are those indicated in the Doing Business statistics. Doing Business measures the number of procedures, time and cost for a small and medium-size limited liability company to start up and operate formally. To make the data comparable across 189 economies, Doing Business uses a standardized business that is 100 per cent domestically owned, has start-up capital equivalent to 10 times income per capita, engages in general industrial or commercial activities and employs between 10 and 50 people within the first month of operations. More details are available on the Doing Business website at: www.doingbusiness.org/data/exploretopics/starting-a-business.

[32] See Doing Business website at www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices.

[33] Supra, footnote 25, pp. 89 ff. The publication notes that the slight majority of the respondents is mostly funded through fees (51 per cent), while the remaining are primarily funded by government (49 per cent). In the previous years, the number of respondents indicating government funding as their primary resource was slightly higher than the registries indicating private financing as their main source.

[34] Supra, footnote 4, pp. 17 ff.

[35] For instance, Armenia, Chile and Kosovo. Information on Armenia and Chile is available in World Bank Group, Doing Business 2014, page 73; information on Kosovo can be found in World Bank Group Doing Business 2013, page 213.

[36] See supra, footnote 4, page 17.

21. Business registries also collect fines for late filing and other breaches.[37] Some State examples have provided evidence that these fines can constitute a direct incentive for businesses to comply with registration obligations. For instance, in one State a company's right of exemption from audit might be forfeited if the company files its annual returns late.[38] In another State, filing obligations are enforced by a sequence of fines for late filing and ultimately by compulsory liquidation.[39] In some cases, fines are used as a source of funding for the registry: the Global Analysis (2012) has noted that this might not be an incentive for registries to seek to improve business compliance, since such registries would lose revenue if compliance improved.[40] Fines should thus be determined so as to encourage business registration without affecting the funding of registries when compliance improves.

22. Many registries derive most of their self-generated funding from fees for information products, which often motivates them to provide additional services to their clients. A recommended good practice is not to charge these fees for basic services, such as name searches, but only for more sophisticated ones (e.g. direct downloading).[41] As in the case of registration fees and fines, fees for information products should also be set at a level low enough to make their use attractive to businesses.

23. Determination of fees, regardless of the fee type, is said to be a crucial issue since, even when the cost recovery principle is applied, there is considerable room for variation. One approach[42] is that fees for new registrations are calculated according to costs incurred by an average business for registration activities over the life cycle of the business. In this way, potential amendments, apart from those requiring official announcements, are already covered by the fee companies pay for new registration. This results in several benefits: (i) most amendments are free of charge, which encourages compliance among registered businesses; (ii) both the registry and the businesses save resources related to fee payment for amendments; and (iii) as part of the cost for processing amendments will be generated later, the temporary surplus produced can be used to improve registry operations and functions. In other countries, registries charge fees below their actual cost.[43]

B. Standardizing incorporation documents

24. One of the most common features of business registration in countries with expedited and effective procedures is the use of standard registration forms. Such forms can be easily filled out by businesses without the need to seek the assistance of an intermediary, thus reducing the cost and de facto contributing to the promotion of business registration among MSMEs. In addition, such an approach eases the workload at registries, helps prevent errors, and speeds up registration. According to several States' examples, after introducing such standardized documents, application rejection rates and processing time at the registry are reduced. In some cases, registration requirements have been streamlined along with standardizing incorporation documents. In one State,[44] only the articles of incorporation are required to form a company; in others,[45] a company is incorporated by registering the

[37] Ibid.

[38] D. Christow, J. Olaisen, Business Registration Reform Case Studies – Ireland, 2009, page 15, available on the Investment Climate website at www.wbginvestmentclimate.org/uploads/Business+RegCase+StudiesIrelandfinal.pdf.

[39] Investment Climate (World Bank Group), NORAD (The Norwegian Agency for Development Cooperation), Brønnøysund Register Centre Business Registration Reform Case Study: Norway, 2011, page 32.

[40] For instance, the former Yugoslav Republic of Macedonia, Serbia, Italy, some states in the United States of America, New Jersey and Colorado. See supra, footnote 4, page 17.

[41] Ibid.

[42] Norway, ibid., pages 17-18.

[43] For instance, Viet Nam, Ukraine, South Africa, Malawi and Colorado. Ibid., page 18.

[44] For instance, Jamaica, see World Bank Group, Doing Business 2006, page 13 and supra, footnote 5, page 7.

[45] For instance Serbia and Montenegro, World Bank Group, Doing Business 2006, page 13.

founding deed. The founders may further describe their business relationship in a separate contract if they wish, but the contract does not have to be registered. In another State, when the standardized forms available on the website have not been properly completed, companies have 15 days to correct the errors and refile their application without paying additional fees. Only about a quarter of applications are returned for correction, and those are approved within 2 weeks.[46] In yet another State, the legislative framework provides for a "sample protocol" to be used by founders of a simplified limited liability company.[47] According to data gathered in 2009, 65 countries at that time had standard registration forms.[48]

C. Minimizing judicial involvement in registration

25. As mentioned in previous paragraphs, business registration is a judicial process in several States. Evidence suggests, however, that involvement of the courts seems to result in longer and more expensive registration procedures when compared with States in which registration is an administrative function. In States where registration is a judicial process, entrepreneurs are said to spend 14 more days to start a business[49] and registration is said to average a cost of 32 per cent of income per capita, as opposite to 23 per cent income per capita in States where registration is an administrative process. Some States manage to have court registration procedures that run economically and efficiently, however this has required adjustments to the system. In one such State, for instance, a law was adopted that eliminates all registration-related costs and removes some procedural burdens. As a result, the number of new registrations rose from 19,000 the year before the reform to about 26,000 the year after.[50] Another State,[51] while keeping registration in the courts, has made registrars and administrative staff, rather than judges, responsible for doing the work. An increasing number of States, however, have turned, or are turning, registration into an administrative procedure, given the high cost of judicial registration and the fact that business registration is considered not to require judicial expertise. This often requires the creation of a centralized system, accessible online, which can provide more predictable and transparent information. The location of the registry can be moved to a government,[52] an executive agency, a private entity (such as a chamber of commerce),[53] or a private sector company,[54] and when the registry does remain affiliated with the judiciary, the relationship is usually limited to administrative oversight. For instance, in one State[55] the *State Enterprise Centre of Registers* is a public entity with limited liability, which belongs to the State as it is incorporated on the basis of State-owned property; property and assets transferred to the Centre and acquired by it are possessed, used and disposed of in trust. In another State, a public-private partnership was set up, with the contractor developing new systems, setting up and operating additional offices and introducing online facilities.[56]

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[46] For instance, Slovakia, ibid.

[47] For instance Germany, the German Limited Liability Act (up to three founders, one director; see Article 2, para. 1a, Limited Liability Act).

[48] Supra, footnote 12, page 188.

[49] World Bank Group, Doing Business 2005, page 22.

[50] Austria, World Bank Group, Doing Business 2004, page 27.

[51] Montenegro, see supra, footnote 5, page 21.

[52] For instance, Chile.

[53] For instance, Colombia, Honduras and Luxembourg, see supra, footnote 5, page 21; and World Bank Group, Doing Business 2005, page 24.

[54] For instance, Gibraltar, see Investment Climate Advisory Services, World Bank Group, Outsourcing of Business Registration Activities, Lessons from Experience, 2010, pages 55 ff.

[55] Lithuania, see European Commerce Registers' FORUM, European Commerce Registers' FORUM Report 2013, page 17.

[56] India, see supra footnote 55, page xi.

D. Making the use of notaries optional

26. When the business registration system is court-based, the mandatory use of notarial services is often required. Notaries perform mainly a verification role, such as verifying signatures or certifying that the required paid-in minimum capital (if any) has been deposited. Requiring the use of such notarial services often represents a considerable burden for entrepreneurs, with costs that can constitute up to 80-84 per cent of the total cost of registration.[57] A benchmarking exercise conducted by the European Commission in 2002 found that fees paid to lawyers or notaries because of their mandatory involvement was one of the two principal factors accounting for most of the differences in business registration costs among Member States.[58] Many countries have thus eliminated notarization or have made it optional through the use of standardized documents or online procedures; in some cases,[59] standardized articles of association have also been introduced. In some countries where notarial services in business registration are still mandatory, reforms have been undertaken with a view to making such use more efficient, for instance, by improving communication between the notary and the commercial registry,[60] by allowing certain types of companies to file their registration application with the court registries electronically through the notary[61] or by lowering notarial fees. In one State, such fees are based on the value of the share capital, for instance, with a share capital of up to 1,000 euros the notarial fees amount to 10 euros.[62] A recent survey has noted that only in Europe does the intermediation of a notary seem to be the most important pre-registration activity.[63]

E. Reducing or eliminating the minimum capital requirement

27. The paid-in minimum capital requirement reflects the amount that the entrepreneur is required to deposit in a bank or with a notary before registration and up to three months following incorporation. The amount is typically specified in the commercial code or the company law of a State. It has been noted that many countries with a minimum capital requirement allow businesses to pay only a part of it before registration, with the rest to be paid after the first year of operation.[64]

28. Several reforms in recent years have questioned the function of the minimum capital requirement, which is said to considerably slow the registration of new businesses.[65] Although supporters of the minimum capital requirement insist that it is necessary to protect creditors and investors, it has increasingly been observed that the requirement does not fulfil any regulatory function by protecting creditors, customers or the business itself against poor performance of the business. For instance, the requirement does not shield the business from insolvency: in several countries the minimum capital can be paid in kind or withdrawn immediately after registration. Furthermore, recovery rates in bankruptcy are not higher in countries with minimum capital requirements when compared with those with no such requirements.[66] Minimum capital requirements do not protect investors and consumers from new firms that are carelessly set up or might not be financially viable,

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[57] For instance, Mexico and Turkey, see supra, footnote 5, page 7.
[58] See, European Commission Enterprise Directorate General, Benchmarking the Administration of Business start-ups, 2002, page 10.
[59] For instance, Lesotho, Mongolia and Uruguay, World Bank Group, Doing Business 2014, page 75.
[60] Germany, available at the Doing Business website www.doingbusiness.org/reforms/overview/topic/starting-a-business.
[61] Croatia, available at the Doing Business www.doingbusiness.org/reforms/overview/topic/starting-a-business.
[62] Germany, available at the Doing Business website www.doingbusiness.org/data/exploreeconomies/germany/starting-a-business/.
[63] See supra, footnote 25, page 65.
[64] See World Bank Group, Doing Business 2008 page 70.
[65] See Doing Business website at www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#reducing.
[66] Ibid.

since the minimum capital is often a fixed amount that does not take into account the firms' economic activities, size or risks. In some cases the amount of the capital requirement is the same even when the companies are of a different type.[67] In one State, for instance, a small company in the services industry with a low start-up capital has to pay the same amount as a large manufacturing company with high initial capital.[68] Research shows that States protect investors and creditors, particularly in the case of limited liability companies, through means other than the minimum capital requirements. Some economies adopt provisions on solvency safeguards in their legislation,[69] others conduct solvency tests[70] or require an audit report showing that the amount a company has invested is enough to cover its establishment cost.[71]

29. Of the 189 economies reviewed in *Doing Business 2014*, 99 have no minimum capital requirement.[72] Some economies never required businesses to deposit money for incorporation, while others[73] have eliminated minimum capital requirements in the recent past. In other cases new forms of limited liability companies with lower minimum capital requirements and simplified incorporation procedures have been introduced.[74] Some States[75] allow initial incorporation of a simplified limited liability company for only 1 euro, provided that progressive capitalization occurs, for example, the company must set aside a certain percentage of its annual profits until its reserves and the share capital jointly total the required amount. In another State, the introduction of a lower capital requirement resulted in a 40 per cent increase in registration in the year following the reform.[76]

30. According to a study of selected European Union (EU) States, lowering or abolishing the minimum capital requirement has led to a marked increase in the number of registered business in four of the States considered:[77] in the year after the reform, average daily incorporations in those States increased by as much as 85 per cent.[78]

F. Providing information on the registration process

31. Easily retrievable information on the registration process and fees is said to often reduce compliance costs and to make the outcome of the application more predictable.[79] It has been noted that in States where fee schedules are easily accessible, starting a business costs 18 per cent of income per capita on average instead of 66 per cent.[80] In most OECD States, fee schedules can be obtained from agency websites, notice boards or brochures without the need for an appointment with an official. In the Middle East and North Africa this is the case in only about 30 per cent of the States and in Sub-Saharan Africa in less than 50 per cent.[81] Surveys of

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[67] World Bank Group, Doing Business 2014, page 42.
[68] Ibid., pages 42-43.
[69] For instance, Hong Kong, China, in its Company Act, see World Bank Group, Doing Business 2011, page 22.
[70] Mauritius, ibid., page 22.
[71] For instance Taiwan, Province of China, see World Bank Group, Doing Business 2011, page 22.
[72] See Doing Business website at www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#reducing.
[73] World Bank Group, Doing Business 2014 reports that 39 economies have eliminated minimum capital requirements in the past seven years.
[74] For instance, Colombia, Croatia, France, Germany, Hungary, Poland, see World Bank Group, Doing Business 2014, page 43 and page 162.
[75] For instance, Italy.
[76] Morocco, see World Bank Group, Doing Business 2011, page 22.
[77] The States referred to are: France, Germany, Hungary and Poland. See World Bank Group Doing Business 2014, page 43.
[78] See L. Hornuf, H.G.M. Eidenmueller, A. Engert, R. Braun, Does Charter Competition Foster Entrepreneurship? A Difference-in-Difference Approach to European Company Law Reforms. European Corporate Governance Institute (ECGI) Finance Working Paper 308/2011, pages 20 ff.
[79] Supra, footnote 5, page 8.
[80] World Bank Group, Doing Business 2012, page 4.
[81] Ibid., page 4.

microenterprises have shown that many informal firms are not very well informed about either the process of formalizing, or the costs involved. In one Asian State, for instance, only 17 per cent of informal firms were said to know the cost of registering. In another State, in Latin America, a study observed that only two-thirds of informal owners knew the locations of the tax office (which is also the registration location) and only 10 per cent were aware of the existence of a commerce registry.[82] The Toolkit (2013), however, provides examples of developing countries that have adopted a "citizen's charter" or a "business bill of rights" requiring large signs in front of business registries stating their processes, time requirements, and fees.[83]

G. Interconnectivity among different authorities and unique identifier denomination

32. New businesses are required to register with several government agencies, e.g. for tax, social security and pension purposes, which often require the same information as that collected by the business registry (refer also to para. 14 above). Several States have thus adopted integrated registration systems, in which one application includes all the information required by different government agencies and, once completed, it is transmitted by the registry to the relevant authorities.[84] Information from the various government agencies is then communicated back to the registry, which forwards it to the entrepreneur. Several best practice countries[85] have also introduced a unique business identification number, or unique identifier in order to further improve information-sharing throughout the life cycle of a business. In the European Union, a recent directive[86] requires Member States to ensure that companies have a unique identifier "to be unequivocally identified" in the new system of interconnected business registries that the directive aims to establish.[87]

33. Unique identifiers not only allow all government agencies to easily identify new and existing companies and to cross-check information, but improve the quality of the information provided in the business registration, since the identifiers ensure that information is linked to the correct entity even if its identifying attributes (e.g. name, address, type of business) change.[88] Moreover, unique identifiers prevent the intentional or unintentional duplication of entities, which is especially important where financial benefits are granted to legal entities or where liability to third parties is concerned.[89] Unique identifiers produce benefits for the businesses as well, in that they considerably simplify business administration procedures; entrepreneurs do not have to manage different identifiers from different authorities, nor are they required

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[82] See M. Bruhm, D. McKenzie, Entry Regulation and Formalization of Microenterprises in Developing Countries, 2013, pages 7-8.

[83] Bangladesh and Guinea, see supra, footnote 5, page 8. However, two randomized experiments have found that just improving quality and availability of information on the business registration process and its benefits might not result in increased formalization. See Belo Horizonte, Brazil, and Bangladesh, see G. H. Andrade, M. Bruhn, D. McKenzie, A Helping Hand or the Long Arm of the Law? Experimental Evidence on What Governments Can Do to Formalize Firms, 2013; and G. Degiorgi, A. Rahman, SME's Registration: Evidence from an RCT in Bangladesh, 2013.

[84] See Supra, footnote 5, page 9.

[85] For instance, Malaysia introduced its first smart ID card for companies, Mykad, in 2001, in 2010 the country introduced the automated version called MyCoID. India uses a unique company ID number for multiple tax registrations. Singapore introduced a single ID number for all company interactions with government in January 2009, replacing multiple ID numbers. See World Bank Group, Doing Business website at www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#Introducing.

[86] See Directive 2012/17/EU of the European Parliament and of the Council, 13 June 2012.

[87] Although not in the context of business registration, it is to be noted the global Legal Entity Identifier (LEI) initiative, endorsed by the G-20, which aims at the creation of a unique identifier which uniquely identifies parties to financial transactions (see G-20 Final Declaration, Cannes Summit 4 November 2011 and Communiqué issued by G-20 finance ministers and central bankers on 5 October 2011 for instance).

[88] See Doing Business website at www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#Introducing.

[89] Supra, footnote 4, page 21.

to provide information to different authorities. The business identifier enables the authorities to exchange information about the business among themselves.[90]

34. Adoption of a unique business identifier normally requires a centralized database linking the businesses to all relevant government agencies whose information and communication systems must be interoperable (often a major obstacle when implementing this practice).[91] Adoption of a unique business identifier is often done in one of two ways. In some countries, business registration is the first step and includes the allocation of a unique identifier, which is made available to the other authorities involved in the registration process.[92] In other countries, the allocation of a unique business identifier represents the beginning of the process and all the relevant information is then made available to the government agencies involved in business registration, including the business registry.[93] Use of a unique identifier can be restricted: in some countries certain government agencies still allocate their own identification number although the business carries a unique identifier.[94]

35. Introducing a unique business identifier requires the conversion of existing identifiers. In one case, for instance, the State decided to use the old value-added tax identifier number as an enterprise number, rather than introducing new numbers, in order to minimize administrative disruption.[95] In another case, since different registries were merged into a new register of legal entities, a new number was assigned to each business. A device of the new registry, calculating the numbers in chronological order, assigned a nine-digit organization number to each business, which was then requested to verify the related identifying information.[96]

36. The Global Analysis (2012) has noted that when introducing unique identifiers, regard must also be had to the case of individual businesses. In some countries different organizations allocate identifiers to individual businesses and to companies. However, it may not always be evident that a certain business represents an individual business and not a company with one owner, which might result in the business being allocated several different identifiers. This would affect the uniqueness of the identifier, which requires avoiding that several identifiers are allocated to one business or that several businesses are allocated the same identifier. A common regime for the identification of all types of business and legal entities is thus suggested as a safeguard against this particular form of duplication.[97]

Information-sharing and data protection

37. The Global Analysis (2012) has also drawn attention to the importance that a unique business identifier protect sensitive data and privacy, while facilitating information-sharing.[98] National legislation often includes provisions on data protection and privacy and in some States registered information related to businesses is considered private and is not publicly available. However, a major trend towards increased transparency is to be noted as a result of international efforts to fight money laundering and terrorist activity, as well as the adoption of policies of knowing your customers and your business partners. As the Global Analysis (2012) notes, such reforms aiming at the need for increased information-sharing do not present any particular challenges as long as individual privacy is considered and addressed.

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[90] Ibid.
[91] See supra, footnote 5, page 9.
[92] Belgium, see supra, footnote 4, page 20.
[93] Norway, ibid.
[94] For instance, Belgium, where businesses need to separately register with the social security administration. Ibid., page 21.
[95] Belgium, ibid.
[96] Norway, ibid.
[97] Ibid.
[98] Ibid., pages 22-23.

H. A single interface for business registration: one-stop shops

38. One of the most popular reforms to improve business registration is the establishment of one-stop shops, i.e. single interfaces for business start-ups where entrepreneurs receive all the information and forms they need in order to complete the necessary procedures to establish their business rather than having to visit several different government agencies. One-stop shops can be virtual or physical offices (the latter, when in rural areas, are particularly appropriate for businesses with limited access to municipal centres), they can be for business registration only or carry out many integrated functions, including post-registration formalities with tax authorities or municipalities. Some one-stop shops automatically forward information from the company registry to the licensing authority,[99] others include separate desks with representatives from different agencies,[100] others provide a single electronic interface for entrepreneurs[101] and yet others are expanding beyond that. For instance, in one State[102] a public service centre assists entrepreneurs not only with business licenses and permits but also with investment, privatization procedures, tourism-related issues and State-owned property management.

39. According to recent data, 96 economies around the world have some kind of one-stop shop for business registration, and 35 of such economies have established or improved one-stop shops in the past 5 years.[103] In these States, business start-up is more than twice as fast as in States without such services, which are said to be conducive to increasing registration volumes. In a recent case,[104] for instance, introducing a one-stop shop for business registration has led to a 17 per cent increase in new firm registrations; in another case, a 5.2 per cent increase in new firm registrations was recorded.[105]

40. Research has noted, however, that not all reforms in this area have been successful: some resulted in additional procedural steps instead of simplification. In order to avoid this, establishing one-stop shops must be part of a larger set of organizational and procedural improvements supported by the collaboration of the relevant government authorities that share responsibilities for promoting business start-up. One recorded best practice is to simplify procedures, appoint an existing agency as the access point and bring together the other agencies.

41. Although one-stop shops do not necessarily require legal changes in the domestic framework, it is important for them to be legally valid and to be given a sufficient budget.[106] They should include at least business registration, income tax, and value-added tax authorities and, if the one-stop shops aim to integrate registration and post-registration services, social security, customs, and licensing and inspection authorities could participate. For instance, in 2010, a State[107] established a new company registry that acts as a one-stop shop, combining company and tax registration, as well as publication in the Official Gazette, while charging a flat registration fee. Another State, in 2008, implemented a one-stop shop combining

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[99] For instance, Ethiopia, available at Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

[100] For instance, Zambia, available at Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

[101] For instance, Denmark, New Zealand and Norway, available at Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

[102] Georgia (the registration centre is located in Tbilisi), see World Bank Group, Doing Business 2011, page 21.

[103] See Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

[104] Portugal, see World Bank Group Doing Business 2014, page 32.

[105] Colombia, available at Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

[106] See supra, footnote 5, page 9.

[107] Afghanistan, available at Doing Business website www.doingbusiness.org/reforms/overview/topic/starting-a-business.

company registration, approval of the company seal,[108] registrations with tax, statistical and social security authorities, and the State insurance company at the State Register.[109]

42. The Toolkit (2013)[110] has highlighted that agency representatives assigned to one-stop shops should have decision-making authority and that they should not simply accept documents on behalf of their agencies and then take the documents to those agencies for further processing. In addition, representatives of different agencies should be accountable to the one-stop shops administrator as well as to the authorities in their respective agencies. Otherwise, they may neglect to show up at the one-stop shops or fail to deliver timely information or approvals to clients. Best practices have shown the importance of trained one-stop shop officials and of routine monitoring of one-stop shop performance by the supervising authority in accordance with client feedback. Properly set up and functioning one-stop shops allow for savings of time and money and increase transparency. For instance, in one State a one-stop shop was opened where civil servants sit in full view behind open counters, so that there is no opportunity for low level corruption through payment of money in order to facilitate timely consideration of the documents and decision-making, and a flat fee replaces the former variable fee schedule, thus further reducing discretion.[111]

I. Using information and communication technology

43. Establishing systems supported by information and communication technology (ICT) is another common reform that can improve business registration. Paper-based registration requires sending documents by mail or delivering them by hand to the registry for manual processing. It should be noted that delivering documents by hand is not unusual in developing countries where registration offices are usually located in the municipal areas and not easy to reach for many MSMEs of the rural areas.[112] As the Global Analysis (2012) has noted, manual processes are time-consuming and expensive, both for the registries and the users, and they increase the risk of error while requiring considerable storage space. By way of contrast, ICT-supported solutions allow business registries to reduce the storage space necessary for paper-based systems and to produce standard forms that are easier to understand and therefore easier to complete correctly; in addition, they enhance data integrity, information security, registration system transparency, and verification of business compliance. Moreover, ICT is instrumental to the development of integrated registration systems and the implementation of unique identification numbers. As a result, use of ICT makes registration faster and more cost-effective.[113] For instance, in one State[114] the ICT based registry reduced total registration time from 46 days to

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[108] The law in Belarus does not oblige the companies to have a company seal, but this is mandatory for certifying bank transactions, including for opening a bank account and also for power of attorneys. However, the State bodies and institutes, for example tax authorities, cannot refuse documents that do not have a company seal. See BridgeWest website, Set up a company in Belarus, at www.bridgewest.eu/article/set-up-company-belarus.

[109] Belarus, available at Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/reforms. In Viet Nam, the reform resulted in the creation of a one-stop shop combining the processes for obtaining a business license and tax license and by eliminating the need for a seal for company licensing. See, UNIDO, Business Registration Reform in Viet Nam: A situation analysis of the reform and of UNIDO support, 2011, available at www.unido.org/fileadmin/user_media_upgrade/Worldwide/Offices/Vietnam_BRR_Dec2011.pdf.

[110] Supra, footnote 5.

[111] See Indonesia, World Bank Group, Doing Business 2011, page 21.

[112] As noted by various experts, the quality of the postal services provided in developing countries is often poor, with legal service obligations (e.g. letter delivery to all customers) not being met. See for instance, The World Bank Group, The Postal Sector in Developing and Transition Countries, Contributions to a Reform Agenda, 2004, page 2.

[113] Supra, footnote 5.

[114] Malaysia, available at the Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

less than a week; in another case[115] the administrative costs of the registration process were reduced by 71.3 per cent with savings amounting to 10.2 million euros a year.

44. Introduction of online business registration can range from using simple databases and workflow applications for simple operations (e.g. name search) to sophisticated web-based systems that enable customers to conduct business with the registry entirely online (which may be quite convenient for smaller firms operating at a distance from the registry, provided that they can access the system) and to government-wide information structures. For instance, in one State entrepreneurs had to manually complete more than 30 forms and visit 6 different agencies — which led 96 per cent of them to hire a lawyer as their agent. After the State developed a new online system, entrepreneurs enter their information once, and the online system automatically distributes it. They can use the system, among other things, to conduct name searches, register a company, and pay local taxes and the corporate registration tax.[116] In another case, the newly introduced online registration system allows for interoperability between two government agencies dealing, respectively, with business registration and tax administration, which is a ground-breaking initiative in the State. Furthermore, the online registration form has a gender field that allows the system to break out data by gender of the business shareholder.[117] In one of the States considered among the top performers in business registration, no physical visit to the registry office is required during the whole registration process. The entrepreneurs find the necessary forms on an online filing centre and submit them electronically. The incorporation certificate is e-mailed to the company together with the articles of incorporation. After processing the business' articles of incorporation, the competent government agency provides the business with its business number (which is assigned by the federal taxation agency) at no charge and which allows registration with various government agencies.[118]

45. According to available data, electronic registration is possible in more than 80 per cent of high-income States,[119] in particular in those with the fastest business start-up. One of the first States to develop an online registration system has made its use mandatory since 2008;[120] in another State[121] registration has been entirely paperless since 2006; and some States allow for registration to be completed online in one simple procedure.[122] Online registration is accessible in about 30 per cent of low-income economies as well, a percentage that is increasing.[123] In such economies, internet facilities are often available at local community centres, post offices, and municipalities. Recently, one such State has made it possible to register new businesses via mobile phone.[124]

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[115] Slovenia, available at the Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#creating.

[116] Republic of Korea, see World Bank Group, Doing Business 2012, pages 27-28.

[117] Nepal, additional information available at Investment Climate, Facilitating Business Registration for Entrepreneurs in Nepal, www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/facilitating-business-registration-for-entrepreneurs-in-nepal.cfm.

[118] Canada, the process described in the section refers to incorporation of businesses at the federal level, see supra, footnote 8, pages 6-7.

[119] For instance, New Zealand, Australia, Singapore, Canada, Portugal, Denmark and Estonia, available at the Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#using.

[120] New Zealand.

[121] Canada.

[122] For instance, Canada and New Zealand, available at the Doing Business website www.doingbusiness.org/data/exploretopics/starting-a-business/reforms.

[123] In 2013, for instance, Guatemala launched Mi Negocio, an online platform that allows registering a new company with the commercial registrar, the tax authority, the social security institute and the Ministry of Labor. See Doing Business website at: www.doingbusiness.org/data/exploreeconomies/guatemala/starting-a-business.

[124] For instance, Kenya, see Kenyans Can Now Register Business Via Phones, 27 June 2014, (available on line, for instance at www.capitalfm.co.ke/business/2014/06/kenyans-can-now-register-business-via-phones/).

46. It has been noted that the rising use of online registration, however, carries with it risks for the security of the registry, in particular in the form of corporate identity theft. Several countries have thus adopted preventive measures. In some States, the identity of the acting person is checked. In one State, for instance, new registrations of sole traders that do not make use of notarial services, are half-automated, as the entrepreneur needs to attend the business registry office in person in order for his identification to be checked with a specific automated system. [125] In other States, a corporate key (unique identifier) is assigned to each corporation upon registration. [126] In one case, the key must be used to update information concerning the board of directors or the registered office address, and to dissolve the corporation. [127] Several States have established monitoring systems and/or e-mail systems that notify registered users about changes; [128] other economies use a combination of the systems described above. [129]

47. A recent survey [130] has indicated that the use of identity verification for those accessing registration services electronically is quite widespread among States around the world (for instance in Europe [131] only 8 per cent of the respondents replied that no verification was required), although it is less common in the Americas. Europe is also the region where electronic signatures are most widespread, although they are not as common as identity verification.

V. Reforms underpinning business registration

48. The best practices discussed in paragraphs 17-46 above usually require reform processes addressing a State's legislative or institutional framework, or the operating procedures of the business itself. Sometimes all three areas need to be reformed. Different international organizations have been particularly active, since the beginning of the last decade, in providing support for such State processes, which has in turn generated diverse lessons learned. The following paragraphs are based on those experiences.

A. Legal reform

49. Business registration reform could entail amending either primary legislation, (i.e. texts such as laws and codes that must be passed by the legislative bodies of a State), or secondary legislation (i.e. regulations, directives etc. that are made by the executive branch within the boundaries laid down by the legislature), or both. As has been noted, reform of primary legislation can be time-consuming, since it requires the involvement of the legislature. Reform of secondary legislation is suggested as a more viable option when circumstances allow. Such a reform can be equally effective as the reform of laws and codes and is certainly faster since it does not need to be reviewed by the legislature. Regardless of the approach, reforms of the domestic legal framework should carefully consider the potential costs and benefits of this process, the capacity and the will of the government and the human resources available.

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[125] The Netherlands, see supra, footnote 56, page 26.

[126] For instance, Australia and Canada, ibid.

[127] Canada, ibid.

[128] For instance, Luxembourg, Estonia, Ireland, Sweden, ibid., page 27.

[129] For instance, Hong Kong, China; and Singapore, ibid., page 26.

[130] See supra, footnote 25, pages 75 ff.

[131] It is worth noting that on 23 July 2014 the European Council adopted a regulation on electronic identification and trust services for electronic transactions in the internal market (and repealing Directive 1999/93/EC). The regulation lays down a new framework for electronic identification and electronic trust services in order to ensure, among others, mutual recognition and acceptance of electronic identification across borders. One of the intended benefits of this new regime is to make it easier to do business in another EU country, allowing entrepreneurs, for instance, to easily set up a company and submit annual reports online. For further information see Press Release ST 11907/14, Presse 402, Brussels, 23 July 2014, available at www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/trans/144112.pdf.

According to the Toolkit (2013),[132] reforms should aim at developing a domestic legal framework with the following features: transparency and accountability, flexible legal forms and general-objectives clauses for business entities, low or no minimum capital requirements, no mandatory use of notaries, a declaratory system, and clarity of the law.

Transparency and accountability

50. Efficient registration systems are said to be transparent and accountable, i.e. to have few steps, limited interaction with authorities, short time limits, be inexpensive, result in a registration of a long-term or unlimited duration, apply countrywide and allow applicants to register at one location — whether a physical site or a website. Best performing States have thus introduced short statutory time limits on business registration procedures and/or "silence is consent" rules (i.e. when a business does not receive a decision on its registration application within the time limit, it is considered registered).[133] It has been noted that the combination of e-registration and of the "silence is consent" rule can shorten considerably start up time. For instance, in one case a State[134] passed a new Company Act and a new Corporate Procedure Act, introducing standardized registration forms, a "silence is consent" rule, and electronic registration. Another State's legislative reform linked various agencies through a central electronic database, and introduced a "silence is consent" rule ensuring automatic registration within 5 days.[135]

Flexible legal entities

51. According to a study which refers to data collected in 59 countries, entrepreneurs tend to choose the simplest legal form available when they decide to formalize. Evidence further suggests that more flexible legal regimes encourage greater formal sector participation:[136] States with rigid legal forms have an entry rate less than half that of States with more flexible requirements.[137] Better performing States have simplified registration for sole proprietorship[138] and/or have introduced new types of limited liability vehicles to meet MSME needs.[139]

General-objectives clauses

52. In several States, entrepreneurs are required to list in their articles of association the specific activity or activities in which they will engage. This is done to restrain firms from acting beyond the scope of their goals and, according to certain literature, to protect shareholders and creditors. Increasingly, however, States allow for the inclusion of a general purpose clause (in addition to the specific purpose clause or as a stand-alone clause), which provides freedom to the entrepreneur to conduct all lawful business activities allowed under the law of the State. In these States,[140] entrepreneurs can change activities without reregistering. A general-objectives clause in the firm's articles of incorporation states that a company's aim is to conduct any trade or business and grants it the power to do so. In practice, this means that the firm has capacities and powers similar to those of natural persons and is not limited to what is stated in its articles. Another State passed a company act making unrestricted

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[132] Supra, footnote 5, pages 17 ff.
[133] Ibid., page 18.
[134] Hungary, available at the Doing Business website www.doingbusiness.org/reforms/overview/topic/starting-a-business.
[135] Serbia, see World Bank Group, Doing Business 2007, page 11.
[136] L. Klapper, A. Lewin, J. M. Quesada Delgado, The Impact of the Business Environment on the Business Creation Process, 2009, page 13.
[137] Supra, footnote 5, page 18.
[138] For example, Guyana, France, Germany and Jamaica, see supra, footnote 5, page 19.
[139] Working paper A/CN.9/WG.I/WP.82 provides some examples of those simplified corporate forms.
[140] In Sweden, for instance, anyone who wants to own a company can buy a pre-registered firm from an intermediary without having to reregister based on its planned activities. See supra, footnote 5, page 18.

objectives the default rule.[141] Many States no longer require businesses to state objectives for registration purposes. Once registered, businesses can engage in any lawful activity, except those which may require sector-specific licenses due to their nature.[142]

Low or no minimum capital requirement and no mandatory use of notaries

53. Abolishing the mandatory use of notarial services and the minimum capital requirement (or lowering the latter) are reforms that require amendment of the domestic legal framework. When notarial services are abolished, for example, appropriate provisions to ensure the veracity of the information provided by the entrepreneurs should be established.[143] In some cases, entrepreneurs registering online without the intermediation of a notary, can use an advanced electronic signature, which contains all the information necessary to identify the signatory and is uniquely linked to it.[144]

54. Countries with efficient registration regimes that have maintained the use of notaries have often streamlined the system. In one case, legislation was passed to ensure that (i) company registration is operated entirely electronically, which included providing the notaries with a qualified electronic signature, and (ii) all relevant company data, including financial statements, are stored centrally within a file. Notaries and their organizations were involved throughout the legislative process as well as in setting the necessary technical standards for a safe data pathway.[145]

Declaratory system

55. Several best performing States use declaratory registration systems,[146] i.e. administrative systems where registration is governed by a company act and administered by company registrars reporting to the ministry in charge of trade and commerce and sometimes also of industry. Establishment of such regimes may require legal reform to reduce the involvement of the courts, which is often easier to accomplish in common law jurisdictions, due to their legal features (see also paras. 6 and 9 above). Since introducing a declaratory system can generate strong opposition, as some experiences at national level show,[147] careful consideration of the domestic context and of the most suitable approach (i.e. whether to adopt a declaratory system or to streamline the registration process within the courts) has been recommended.[148]

Clarity of the law

56. Improving business registration systems may also require updating laws which no longer respond to the needs of MSMEs. In one case, a State reviewing its company law decided to shift the law's focus towards private companies limited by shares, which accounted for the majority of the firms. Provisions for public limited companies, which were the main focus of the old law, were mentioned in the new law as exceptions.[149] Another State moved the legal provisions pertaining to small companies to the beginning of the new company law in order to make them easier to find. The revised bill also used simpler language.[150] In another case, facilitating business start-ups was achieved by a legislative reform process that streamlined procedures and allowed for company incorporation in one day. First, the old system of publishing incorporations, modifications and dissolution of companies in the

[141] United Kingdom of Great Britain and Northern Ireland's 2006 Company Act, ibid.
[142] Ibid.
[143] Canada, see Business Registration Start-Up: A concept note, International Finance Corporation and the World Bank, 2005, page 6.
[144] See Chile for instance.
[145] See Germany for instance.
[146] For example, Australia, Canada, New Zealand, and the United Kingdom.
[147] For example, Honduras and Bulgaria, see supra, footnote 5, page 19.
[148] Ibid.
[149] Ireland, ibid. See also supra, footnote 39.
[150] United Kingdom, see supra, footnote 5, page 19.

Official Gazette was replaced with free online publication of the notice of a company's creation; new companies were provided with an immediate temporary operating license and the use of electronic billing was authorized. As a result, in less than 12 months since the enactment of the law, business start-ups were said to have increased by 35 per cent over the previous year. A second step of the reform addressed simplification of company incorporation, modification and dissolution processes and allowed entrepreneurs to register online.[151] In another State, the reform of the business registration system was complemented by a comprehensive revision of the legal framework as a result of which rules on business registration were unified in a single piece of legislation; the legal obligation for businesses to register was detached from the type of business being operated and harmonized; the subject of fees was extracted from the rules governing business registration and dealt with on a common basis by a centralized business registration system. In order to provide for flexibility, certain provisions were adopted as regulations or the legislator developed the legal basis to introduce legal obligations by means of regulation at a later stage.[152]

57. In addition to those mentioned above, the Toolkit (2013) indicates other issues for consideration in a legislative reform process:[153] (i) enabling e-filing of documents,[154] and the use of e-signatures,[155] e-commerce, and e-payments; (ii) delegation of authority to register a business; (iii) standard but flexible mechanisms for future amendment of fees, procedures, and forms to allow the adoption of an ICT-led system; (iv) a single database of registered businesses; (v) public and free access to registered information in a searchable database; and (vi) information exchange and interoperability (see also paras. 32-36 above).

B. Business process re-engineering

58. Technical assistance experiences indicate that implementation of good practices may often require business process re-engineering, i.e. the analysis of workflows and processes in business registration with a view to establishing whether there are duplications or overlapping procedures.[156] Business process reengineering assesses the purpose of a particular process, its legal footing and the relation between the purposes of the regulations and the process. If the process is found to be necessary, then it should be streamlined; otherwise, it should be eliminated.

C. Institutional framework reform

59. Institutional reform is considered the third component of business registration improvement. Aimed at developing the most appropriate structures to support registration, it has been broadly categorized in two groups: institutional restructuring and capacity development.[157] Institutional restructuring focuses on the institutions most capable of registering businesses given the national context, their legal footing and their accountability, in particular when one-stop shops are established. Consideration is also given to the budget needed to maintain the new institutional setup, in particular when the reform is initiated with donor financing. Establishing a

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[151] See Chile, Law 20.494 (published in the Official Gazette on 27 January 2011) and Law 20.659 (published in the Official Gazette on 8 February 2013). See also the statement of the delegation of Chile to the 22nd session of Working Group I (New York, 10-14 February 2014), sound recording available at: https://icms.unov.org/CarbonWeb/Export.mvc/SpeakersRecordsXml/aa8e90b0-8615-4ec2-b4d3-a9e0d92c4e21.

[152] Investment Climate (World Bank Group), Business Registration Reform case study: Norway, 2011, page 25.

[153] See supra, footnote 5, page 19.

[154] Nepal, available at www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/facilitating-business-registration-for-entrepreneurs-in-nepal.cfm.

[155] For instance, Canada, see supra, footnote 8, pages 6 ff.

[156] Supra, footnote 5, page 20.

[157] Ibid., pages 21 ff.

registration institution as a self-financing body is considered a good practice. Some of the new institutional models of business registration that have emerged in recent years (e.g. registration provided by tax authorities,[158] chambers of commerce,[159] or one-stop shops) seem to better respond to the quest for self-sustainability.

60. Capacity development of registry staff, the other aspect of institutional reform, is important both to enhance staff performance and to train staff on new ways of improving registration. Successful examples in this regard include team-building activities to streamline the information flow among departments;[160] an aggressive action plan with annual targets for advancing in the Doing Business rankings, and promotions and bonuses for staff linked to the achievement of goals;[161] and adoption of new corporate values.[162] Peer-to-peer learning and international networks are considered other effective approaches to build capacity. The former enables a reforming State to see how similar reforms were implemented elsewhere and with what results in order to illustrate lessons learned. Several States have provided opportunities to their registry staff to visit countries with efficient and effective registration systems, preferably jurisdictions familiar to their own.[163] The Toolkit (2013) has noted that the more conservative the States undertaking the reform, the more important the function of demonstrating proven practices elsewhere.[164] International fora and networks such as global corporate registrars' forums, the International Association of Commercial Administrators, and the European Union's Registrars Forum also provide platforms for sharing knowledge and exchanging ideas among registry personnel around the world for implementing business registration reform.[165]

VI. Conclusion

61. The best practices discussed in this Working Paper indicate that while there is no standard approach in reforming business registration systems, in best performing States such systems possess similar features. These can be grouped around the following main areas: reducing or eliminating the minimum capital requirement; developing a non-judicial process; creating a single interface; introducing a unique company identifier; introducing information and communication technology; and making forms and fee schedules easily accessible.[166] It has been brought to the attention of the Secretariat that some data referred to in many of the sources cited in this Working Paper refer mainly to small and medium-sized enterprises, rather than to micro-businesses.[167] The Working Group might thus wish to consider whether these best practices respond to the needs of micro-businesses or whether they require adjustments consistent with the features of micro-businesses (see discussion at the twenty-second session of the Working Group A/CN.9/800, para. 47).

62. In addition, a recent study[168] has noted that many small scale enterprises operating informally in developing countries remain informal despite efforts to

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[158] For instance, Azerbaijan, Georgia and the Russian Federation.
[159] For instance, Colombia and Luxembourg.
[160] Peru, see supra, footnote 5, page 22.
[161] Saudi Arabia, ibid.
[162] Malaysia, ibid.
[163] For instance, Botswana, China, Malaysia, ibid.
[164] Ibid.
[165] Ibid.
[166] See also the Doing Business website at: www.doingbusiness.org/data/exploretopics/starting-a-business/good%20practices#making.
[167] The Doing Business website, in presenting the methodology adopted to assess the category "starting a business", clarifies that it measures the number of procedures, time and cost for a small and medium-size limited liability company to start up and operate formally. For further information see www.doingbusiness.org/data/exploretopics/starting-a-business/what%20measured.
[168] Supra, footnote 83, pages 1-2.

simplify and lower the cost of business registration processes.[169] This would suggest that these firms may not see the advantages of registration and formalization even after a reform. According to the evidence collected in the study, improvement of registration systems would seem a necessary, but insufficient step, and policymakers should experiment with innovative approaches to encourage formalization.[170] An example being tried in some countries is to link the tax receipt number to a lottery, so that customers have an incentive to demand a tax receipt at each transaction.[171] According to another recent study, surveying existing literature on the topic of investment climate reforms, business entry reforms are also constrained by issues such as tax burden, land titling and registration, and lack of incentives to formalize.[172] Interventions around these issues are thus suggested as having a positive effect on formalization.

63. In furthering its work on simplified registration, the Working Group may wish to consider this discussion and its possible implications for further work in the area of business registration. In this regard, the extensive experience of international organizations in providing support to State reform processes should be noted. Therefore, the Working Group may wish to consider the following issues:

(a) Are the best practices for business registration outlined above sufficient to meet the needs of micro-businesses?

(b) Is it possible to add value to the existing work in this area without duplicating the efforts and achievements of other organizations?

(c) If so, what form should that work take?

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[169] The study mentioned in footnote 171 above refers, inter alia, to evaluations carried out in Sri Lanka, Bangladesh and Brazil.

[170] M. Bruhm, D. McKenzie note that in some countries, legislation has been enacted that does not require “subsistence enterprises” with income below a certain threshold to register. See supra, footnote 84, page 14.

[171] Ibid.

[172] See A. Rahman, Investment climate reforms and job creation in developing countries: what do we know and what should we do?, 2014, page 14.

C. Note by the Secretariat on micro, small and medium-sized enterprises - Legal questions surrounding the simplification of incorporation and draft model law on a single-member business entity

(A/CN.9/WG.I/WP.86 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session in 2013, the Commission requested that a working group should commence deliberations aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle. The Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should initially "focus on the legal questions surrounding the simplification of incorporation".[1]

2. The Working Group first considered this topic at its twenty-second session (New York, 10-14 February 2014), at which time it discussed a number of issues relevant to the legal questions surrounding the simplification of incorporation. These issues included: limited liability, legal personality, the protection of third parties and creditors dealing with the enterprise, registration of the business, sole ownership, minimum capital requirements, transparency in respect of beneficial ownership, internal governance issues, and freedom of contract, as well as the possible form that a legal text could take. At the conclusion of its twenty-second session, the Working Group requested the Secretariat "to prepare a template on simplified incorporation and registration containing contextual elements and experiences linked to the mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly, but not exclusively, as they applied to MSMEs in developing countries." This working paper and A/CN.9/WG.I/WP.86/Add.1 were prepared in order to meet that request.

II. Possible approaches to the creation of a legal text

A. Previous discussion in the Working Group

3. The Working Group may wish to recall that at its first session, it had been noted that a main concern of its work was to ensure that sole proprietors could be included in a simplified incorporation regime, even though such entrepreneurs might be engaged in relatively simple business activities.[2] Moreover, while there was support for the view that a single legislative model for simplified incorporation with built-in flexibility could be appropriately adapted to all forms of MSMEs, it was suggested that such an approach could be both complicated and expensive, particularly for micro and small businesses. In addition, there was also support for the suggestion that a legislative regime for a continuum of different business forms could be explored (sole proprietorship, partnership and limited liability company) that would accommodate different types and sizes of entrepreneurs based on their needs and circumstances.[3]

4. It was also emphasized during the previous session of the Working Group that even a very simple legislative model might be too complex and burdensome to meet the needs of micro-businesses, most of which consisted of sole proprietors. It was observed that one of the greatest needs of micro-entrepreneurs was the ability to set up their businesses quickly and easily,[4] and that requiring micro-businesses to incorporate, even in a simplified fashion, could work against bringing such businesses into the formal sphere.[5] Although the Working Group did not determine specifically how best to accommodate the needs of microenterprises, there was agreement that, at

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321. For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.84, paras. 5-14.

[2] Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014) ("Report of Working Group I"), A/CN.9/800, para. 24.

[3] Ibid., paras. 30 and 33.

[4] Ibid., para. 42. Reference was also made to the need for micro-entrepreneurs to gain access to credit to grow their businesses.

[5] Ibid.

least as an initial step, the treatment of micro-entrepreneurs should focus on simplified registration.[6]

B. A possible way forward

5. While the Working Group did not reach agreement at its inaugural session on the specific approach to be adopted in exploring the legal questions surrounding the simplification of incorporation, there was a general view that the needs of micro-businesses warranted particular attention, both due to their size and to their importance in the economy of many States, including in most developing countries. As such, one approach that the Working Group might consider in order to move forward systematically in its analysis could be to study the issues involved by focusing first on the needs of very simple micro-businesses wishing to formalize in the simplest manner possible, and then to review a continuum of possible legal regimes suited to increasingly larger and more formalized business entities.

6. The initial focus of the Working Group could be on business registration, which is the starting point for formalization of all businesses, regardless of size (and is treated in greater detail in A/CN.9/WG.I/WP.85). At the registration stage, it is open to the founder or founders of a business to choose which legal form their business should take; however, it is equally possible for an entrepreneur to choose simply to register a business (and thus to take advantage of whatever benefits and responsibilities that may entail in the entrepreneur's jurisdiction),[7] but not to choose any particular legal form for the business. This very simple approach to formalization could be attractive for microenterprises or sole proprietorships that determine they do not need legal personality nor the protection of limited liability offered by more structured business entities, but would nonetheless like to derive some benefit from the advantages offered by a particular jurisdiction to businesses that formalize.[8]

7. In order to reflect the emphasis of the Working Group on microenterprises, which consist predominantly of individual entrepreneurs, the next level of formalization for MSMEs that might be considered by the Working Group could be a legislative regime designed specifically for sole proprietors, i.e. a "think small first" approach. Such a regime could emphasize simplicity, but nonetheless offer to micro-entrepreneurs an improvement over simple registration by allowing a sole proprietor to form a business with legal personality and the protection of limited liability.[9] This type of regime could provide to the individual entrepreneur the main advantages seen as particularly attractive to micro- and small businesses: permitting them to use freedom of contract to form, via a simple, low-cost structure, a business that is member-managed and that has legal personality while excluding personal liability via the protection of limited liability.[10]

8. An example of a regime that could offer these advantages to an individual entrepreneur has been prepared for possible consideration by the Working Group in Working Paper A/CN.9/WG.I/WP.86/Add.1. The text contains both a draft model law on a single-member business entity ("MLSBE") and commentary on its various

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[6] Ibid., para. 43.

[7] See, for example, the advantages to both the entrepreneur and the government outlined in Working Paper A/CN.9/WG.I/WP.85, para. 5.

[8] See the Report of Working Group I, A/CN.9/800, paras. 47-48 and certain of the legal regimes described in Working Paper A/CN.9/WG.I/WP.87.

[9] Along these lines, the European Commission is exploring a Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, European Commission, Brussels, 9.4.2014 (COM (2014) 212 final). The European Commission's previous efforts to reach agreement on the adoption of a European Private Company Statute (Proposal for a Council Regulation on the Statute for a European private company, COM (2008) 396) were unsuccessful, and the proposal has been officially withdrawn (Annex to the Communication on "Regulatory Fitness and Performance (REFIT): Results and Next Steps", COM (2013) 685, 2.10.2013).

[10] International Encyclopedia of Comparative Law, Volume XIII, Business and Private Organizations (1998), Detlev Vagts ed., Chapter 2, Limited Liability Companies and Private Companies, p. 183.

provisions. The single-member nature of the business entity would make it possible for the Working Group to take a pared down approach to examining the legal questions surrounding the simplification of incorporation, and to find agreement first on basic principles prior to addressing more problematic ones that may be associated with more complex business entity structures.[11]

9. The Working Group may also wish to recall that the text of another model law that could also provide sole proprietors (as well as larger business entities) with limited liability and legal personality for their business was presented to it at its previous session and is contained in an annex to document A/CN.9/WG.I/WP.83 (the Model Act on the Simplified Corporation or "MASC"). The MLSBE was prepared by drawing from principles established in the MASC and in other legislative models creating a legal regime for simplified business entities.

10. Reference will be made to each of these two texts (MLSBE and MASC) in the discussion that follows in order to illustrate the issues identified for possible consideration by the Working Group. Of course, it must be emphasized that the MLSBE and the MASC are only two examples of the many possible approaches that could be taken by the Working Group in its deliberations on the legal issues surrounding the simplification of incorporation aimed at reducing the legal obstacles faced by MSMEs. Examples of other possible regimes that the Working Group may wish to consider can be found in Working Papers A/CN.9/WG.I/WP.82 and A/CN.9/WG.I/WP.87.

III. Outline of the working paper

11. As a preliminary matter, the following discussion reviews three broad principles of key importance to the law of business organizations and on which the Working Group has touched in its previous deliberations. These legal principles underlie the analysis contained in this paper: legal personality, limited liability and freedom of contract.

12. Next, using a framework drawn from various examples of existing legal regimes for privately held business entities, this paper will examine some of the broader issues relevant to a consideration of the legal issues surrounding the simplification of incorporation in the context of MSMEs. This examination is intended to provide an initial review, as requested, of the "contextual elements and experiences linked to the mandate of the Working Group" in order assist it in its deliberations.

IV. Broad legal principles underpinning simplified business entities

13. This paper is prepared on the basis that three main principles relevant to the law of business organizations provide significant advantages to entrepreneurs and provide the foundation for the consideration of legal issues surrounding simplified business entities: limited liability, legal personality, and freedom of contract. Since their inception in the 19th century,[12] privately held companies have enjoyed legal personality and the shield of limited liability for their members; more recently, there has been growth in the importance of the principles of flexibility and freedom of contract for entrepreneurs to shape their businesses as they wish. For the purposes of the following discussion, it is assumed that an entrepreneur or a group of entrepreneurs wishing to formalize a business as a legal entity would base a decision to do so on the advantages offered the entrepreneur as a result of these three principles,

[11] As noted by the Working Group in its previous session, efforts to agree on the creation of a single private limited liability company form in the European Union proved to be difficult (Report of Working Group I, A/CN.9/800, para. 35). As further noted above in footnote 9, the proposal for a regulation on the statute for a European private company has been officially withdrawn, and the single-member private limited liability company has been proposed as an alternative approach.

[12] Supra, note 10, p. 5.

bearing in mind that the Working Group may also wish to consider alternative approaches to the problem, examples of which may be found in A/CN.9/WG.I/WP.87.

A. Limited liability

14. Limited liability protection, in which the financial liability of an entrepreneur for the obligations of the business entity is limited to a fixed sum, usually the value of the entrepreneur's investment in a business entity, has been a fundamental feature of public and private corporate business forms since the 19th century,[13] and is no less important in terms of modern simplified business forms. Limited liability can play a crucial role for an MSME in that it provides the means to separate the personal assets of its members from those owned by the business, thus protecting personal assets from exposure in the event that the business does not do well or becomes involved in legal disputes.[14] Of course, the business entity itself has unlimited liability to its creditors and all of the assets of the business are available to satisfy those claims; in addition, limited liability does not excuse the members of a business entity from their obligation to make the promised contributions to the capital of the entity.[15]

15. The Working Group noted in its previous session that limited liability was an important risk-reducing system that allowed entrepreneurs to take business risks without fear of failure, but it was noted that many MSMEs were currently excluded from such a protective regime and that efforts should be made to include them. Moreover, the Working Group expressed its general support for the view that limited liability, along with legal personality, offered to MSMEs important advantages in doing business and that it was important to provide access to these advantages to such enterprises.[16]

16. The Working Group may also wish to note, and to consider in its deliberations on possible approaches to the issue, that some States have established mechanisms that allow an entrepreneur's assets, under certain conditions, to be segregated from business assets without providing specifically for limited liability.[17] Examples of such regimes are explained in more detail in Working Paper A/CN.9/WG.I/WP.87.[18]

17. Both the MLSBE (article 3) and the MASC (section 2) include provisions on limited liability for the members of the business entity.

B. Legal personality

18. At its previous session, the Working Group also expressed its support for the well-known concept of legal personality. Legal personality confers upon a business entity the legal rights and duties necessary for it to function within a legal system, including the ability to acquire and hold property, to enter into contracts, to sue or be sued, and to act through agents. As noted above, the Working Group was of the view at its previous session that legal personality also offered key advantages to MSMEs and that it should be available to them.[19] Legal personality has also been one of the defining features of corporate business forms, and as noted in A/CN.9/WG.I/WP.82,[20] it is also a standard feature of simplified business forms.

19. As noted previously in the Working Group, some States have established legal regimes that allow for businesses with no legal personality to nonetheless own

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[13] Ibid., p. 4.
[14] See Working Paper A/CN.9/WG.I/WP.82, para. 12.
[15] See, for example, article 7 of the MLSBE in Working Paper A/CN.9/WG.I/WP.86/Add.1.
[16] Report of Working Group I, A/CN.9/800, para. 28.
[17] Report of Working Group I, A/CN.9/800, paras. 29 and 46.
[18] Reference may be had, for example, to the "auto-entrepreneur" system, in which the entrepreneur is not offered limited liability or incorporation, but can declare before a notary that those assets not associated with running the business are exempt from seizure.
[19] Report of Working Group I, A/CN.9/800, para. 28.
[20] See Working Paper A/CN.9/WG.I/WP.82, para. 13.

property and be involved in legal actions.[21] Examples of such regimes are explained in more detail in A/CN.9/WG.I/WP.87.

20. Both the MLSBE (article 2) and the MASC (section 3) grant legal personality to the business entity.

C. Flexibility and freedom of contract

21. The accommodation of entrepreneurs wishing to form flexible legal entities is one of the reforms of a State's legal framework that has been recommended as a supporting pillar for the establishment of best practices in business registration.[22] As noted in Working Paper A/CN.9/WG.I/WP.85[23] and in studies by the World Bank Group, entrepreneurs considering whether or not to enter the formal economy often base their decisions on the simplicity of the legal form available in their jurisdiction. Reportedly, the availability of only rigid legal entities may be expected to hinder business entity growth, and States that do not offer a more flexible legal form experience a greatly reduced rate of business entry. A number of States have introduced new types of limited liability vehicles to meet the needs of entrepreneurs for contractual flexibility in the formation of their business entities, while other States have introduced specific legal reforms to simplify the process of formalization for sole proprietorships.[24] The Working Group may also wish to recall that Working Paper A/CN.9/WG.I/WP.82 compared the main features of 16 different types of simplified and flexible legal business entities from 11 separate States that have recently reformed their legal framework in this regard.[25]

22. Indeed, one of the main goals of closely held businesses, including simplified business entities (such as those considered in A/CN.9/WG.I/WP.82), could be said to be to function as independently as possible from the strict rules that govern publicly traded companies.[26] As noted in documents previously before the Working Group, the main focus of simplified business entities has been on creating flexible business forms that can be tailored to the needs of certain types of closely held businesses, including: MSMEs wishing to formalize and segregate personal and business assets; family firms; joint ventures; and professional service firms.[27] This flexibility is achieved in part by allowing the founders of the enterprise to agree through contractual mechanisms (like joint venture or shareholder agreements) on the internal governance of the enterprise, to contract around the more superfluous and cumbersome protective requirements traditionally associated with publicly traded companies, and to tailor rights and duties that are more consistent with the needs of closely held businesses. Of course, most simplified business entity legislation also includes certain mandatory rules that cannot be contracted out of by agreement among the members.[28]

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[21] Report of Working Group I, A/CN.9/800, paras. 29 and 46.

[22] Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the Practitioners (2013) ("Toolkit (2013)"), pp. 17-19 (found at https://www.wbginvestmentclimate.org/publications/loader.cfm?csModule=security/getfile&pageid=34841), and Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis (2012) ("Global Analysis (2012)") (found at www.brreg.no/internasjonalt/ISBER_Web.pdf).

[23] See Working Paper A/CN.9/WG.I/WP.85, para. 50.

[24] Toolkit (2013), supra note 22, p. 18. See also, Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, European Commission, Brussels, 9.4.2014 (COM (2014) 212 final).

[25] Further, both the MLSBE and the MASC provide for the creation of flexible legal entities, although the former is limited to single-members.

[26] IECL, supra note 10, pp. 2 and 13. Despite differences in their particular legal regime from State to State, in addition to being prohibited from being publicly traded, privately held businesses tend to have specific relief from the rules governing publicly traded companies such as: simpler formation rules; nominal or no minimum capital requirement; greater freedom of contract; and fewer disclosure requirements.

[27] See Working Paper A/CN.9/WG.I/WP.82, paras. 8-11.

[28] See Working Paper A/CN.9/WG.I/WP.82, pp. 10-11.

23. The Working Group agreed in principle that freedom of contract should be a guiding principle in establishing the internal organization of a company, although it was observed that very unsophisticated micro- and small businesses could find it difficult to establish such rules. To that end, the Working Group agreed that standard forms could be useful to assist such businesses.[29] Standard forms to assist micro- and small businesses in this regard could be prepared once the Working Group has agreed on its approach and a text has taken shape.

24. Both the MLSBE and the MASC embrace broad flexibility and freedom of contract, as well as providing default provisions to fill gaps that may exist in the rules established by the members of the enterprise. As observed in A/CN.9/WG.I/WP.82, such default rules may be particularly important for smaller or less sophisticated business persons.[30]

V. Framework for issues to be considered

25. As indicated earlier, this section of the paper will examine various matters that the Working Group may wish to consider in its deliberations on the issues surrounding the simplification of the legal structure for MSMEs, based upon a framework drawn from various examples of existing legislation on privately held entities. This framework is not intended to be exhaustive nor inflexible, but rather as a starting point for discussion. The Working Group is, of course, invited to address any additional or alternative issues that are considered relevant.

A. General provisions

Definitions and the nature of the entity

26. At the outset, a legal text in respect of simplified business entities could be expected to deal with a number of introductory matters. If the text is to be a model law, this is the portion of the text in which necessary definitions of key terms could be inserted. It is also the section of the text in which the nature of the business entity would be stated (for example, a limited liability company, a single-member business entity, or a simplified stock corporation)[31] as well as how the nature of the entity should be reflected in its name in order to alert third parties of its nature (for example, by including the full phrases listed in the previous set of parentheses, or by including abbreviations such as LLC, SBE or SAS, respectively).[32]

Purpose clause

27. In addition, the general provisions of the text would most likely include reference to the purpose of the business entity. As noted in Working Paper A/CN.9/WG.I/WP.85, some States require business entities to list the specific activities in which the business will engage in their formation document (the document or electronic record that is established by the member on formation of the entity) or operating document (the document or electronic record that governs the affairs of the business entity and would include articles of association, by-laws and similar documents). The goal of such a requirement is said to be to restrain firms from acting beyond their scope in order to protect the interests of members and creditors of the business entity.[33] However, the modern trend in respect of general objectives clauses is to allow business entities to engage in all lawful activities under the law of the relevant State and to leave it open to the members of the entity to decide whether or not they wish to include a more restrictive purpose clause in the operating or formation document.[34] Where a business has a general objectives clause, managers

[29] Report of Working Group I, A/CN.9/800, para. 63.
[30] See Working Paper, A/CN.9/WG.I/WP.82, para. 9.
[31] See, for example, MLSBE, article 1 and MASC, section 1.
[32] See, for example, MLSBE, article 4 and MASC, section 5(2).
[33] See Working Paper A/CN.9/WG.I/WP.85, para. 51.
[34] See, for example, MLSBE, article 1 and MASC, sections 1 and 5(5).

have a higher degree of discretionary authority to run the business entity and it is not necessary to amend a business entity's operating document or formation document each time that the enterprise wishes to take advantage of a new business opportunity or to reorient its operations. In fact, the adoption of a legal regime supporting general objectives clauses for business entities is seen as a desirable feature that should be achieved through legal reform and that is necessary to underpin the adoption of best practices in business registration.[35]

28. Both the MLSBE (article 1) and the MASC (section 1) adopt a general objectives clause as the default approach.

Legal personality and limited liability

29. The introductory section of a legal text in respect of simplified business entities could also be expected to include provisions stating that the entity has the fundamental characteristics of legal personality and a liability shield for its members so that they are not personally liable as a result of activities of the business entity in the ordinary course of business.[36]

Minimum capital requirement

30. As previously noted in documents considered by the Working Group,[37] the modern trend in simplified business forms is that they do not typically include a minimum capital requirement, or that they may require only a nominal amount, thus reducing the initial financial burden on smaller entrepreneurs wishing to formalize their businesses.[38] Since the minimum capital required to formalize is often one of the most expensive considerations for new businesses, it is said that a reduction in that amount, or its elimination, could be expected to increase the rate of formalization of business entities.[39] Neither the MLSBE nor the MASC requires the contribution of a minimum capital amount by its members prior to formation.

31. The Working Group may wish to note studies prepared by the World Bank Group list the reduction or elimination of the minimum capital requirement as one of the good practices for starting a business[40] and as one of the key legal reforms underpinning best practices in business registration.[41] In addition, information collected notes while almost 50 economies have abolished or reduced their minimum capital requirements since 2000, many still require entrepreneurs to deposit a certain amount of capital before starting business registration formalities. Noting that the minimum capital requirement has its origins in the 18th century, and was initially intended to protect investors and creditors, it is further observed that in many instances, the deposited capital is often withdrawn immediately after registration and thus of limited value in insolvency. It has also been observed that recovery rates in

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[35] Toolkit (2013), supra note 22, pp. 17-19, Global Analysis (2012), supra note 22, and Working Paper A/CN.9/WG.I/WP.85, para 51.

[36] See, for example, MLSBE, articles 2 and 3 and MASC, sections 2 and 3.

[37] See Working Paper A/CN.9/WG.I/WP.82, para. 17.

[38] Although the Working Group agreed broadly that the modern trend was to move away from minimum capital requirements, some States were of the view that a minimum or a low but progressively increasing capital requirement was a reasonable quid pro quo for a business entity to receive the benefit of limited liability. It was also observed in the Working Group that in the case of MSMEs, a minimum capital requirement could have serious negative effects on the ability of such businesses to enter the formal market, and that even a low initial capital requirement that increased progressively could present a difficult hurdle for MSMEs for which the first few years of operation were most critical. See Report of Working Group I, A/CN.9/800, paras. 29 and 51 to 59; Working Paper A/CN.9/WG.I/WP.85, paras. 26 to 29; and Working Paper A/CN.9/WG.I/WP.86/Add.1,
paras. 10-12.

[39] Toolkit (2013), supra note 22, p. 18.

[40] www.doingbusiness.org/data/exploretopics/starting-a-business/good-practices#1. Note that the other good practices for starting a business identified by the World Bank Group on the Doing Business website are considered in Working Paper A/CN.9/WG.I/WP.85 in paras. 37-41, 31-35 and 42-46, respectively: creating a single interface; introducing a unique company identifier; and using information and communication technology. See also Toolkit (2013), supra note 22, p. 18.

[41] Toolkit (2013), ibid., p. 18.

bankruptcy are no higher in economies with minimum capital requirements than in those that do not have them,[42] and suggested that such requirements can have counterproductive effects on entrepreneurship.[43]

Other ways to protect creditors and third parties

32. The Working Group also considered at its previous session[44] means alternative to minimum capital requirements through which creditors and third parties dealing with the business entity could be protected. These techniques, several of which are included in existing simplified legal regimes for closely held businesses, include providing for:

(a) The liability of members of the business entity for improper distributions and the obligation to repay the entity for any improper distributions;[45]

(b) Standards of conduct including good faith and fiduciary responsibilities;[46]

(c) Limited liability to be lifted in certain circumstances ("piercing the corporate veil");[47]

(d) Transparency in accounting[48] and auditing of financial statements;

(e) The establishment of credit bureaus;

(f) A supervisory role to be established for commercial registries or specialized agencies; and

(g) Corporate governance oversight.

Name reservation

33. Some States require entrepreneurs to reserve a name for the business entity they are forming prior to its formation. In such circumstances, it would be appropriate to include reference to that requirement in the introductory section of the legal text.

B. Formation of the business entity

Number of members

34. The next broad group of issues that a legal text in respect of simplified business entities could include would relate to the formation of the business entity. An initial matter likely to be considered would be the number of members required for formation of the entity. Although historically the minimum number of members required for the formation of a closely held business entity has been the subject of some debate,[49] the more recent trend in most legal systems is to permit the formation of a single member enterprise with limited liability.[50] Another issue that could be considered in this section would be whether a rule on the maximum number of members permitted to form a simplified business entity should be imposed, but that

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[42] Djankov, Simeon, Rafael La Porta, Florencio López-de-Silanes and Andrei Shleifer. 2002. "The Regulation of Entry", Quarterly Journal of Economics 117 (1): 1-37.

[43] Van Stel, Andre, David Storey and Roy Thurik. 2007. "The Effect of Business Regulations on Nascent and Young Business Entrepreneurship", Small Business Economics 28 (2-3): 171-86. www.doingbusiness.org/data/exploretopics/starting-a-business/good-practices#1.

[44] See Report of Working Group I, A/CN.9/800, paras. 52, 55-57, 59.

[45] Such a provision may be found in article 8 of the MLSBE.

[46] See also Working Paper A/CN.9/WG.I/WP.82, paras. 24 to 25, and an example of such a provision in article 42 of the MASC.

[47] See, for example, section 41 of the MASC.

[48] See, for example, article 16 of the MLSBE and section 37 of the MASC.

[49] IECL, supra note 10, pp. 25-29.

[50] See, for example, the membership requirements of the business entities compared in Working Paper A/CN.9/WG.I/WP.82, pp. 7-9, as well as MLSBE article 5 and MASC section 5. See, also, Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009, in the area of company law on single-member private limited liability companies (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:258:0020:0025:EN:PDF).

could be a matter best considered on a State-by-State basis as part of a State's MSME policy framework.

Business registration

35. Registration of the business entity would also be included in a discussion on formation. As noted in other documents before the Working Group,[51] establishing a declaratory system for business registration is also seen as one of the important legal reforms necessary to establish best practices in business registration, in order to increase efficiency and to reduce the potential for corruption in the system.[52] Both the MLSBE (article 5) and the MASC (section 5) contemplate declaratory systems for the registration and formation of the respective business entities.

36. Taking into consideration issues discussed in more detail in A/CN.9/WG.I/WP.85, the optimal means of registration would be exclusively electronic, so as to reduce the cost and time of registering the entity and to provide more efficient means of information-sharing. Although many business registration systems aspire to a completely electronic standard, it is likely that any legal text would need to accommodate both paper-based and electronic means of registration.[53] The Working Group may also wish to note that electronic filing of business entities would permit them to be created without the intervention of intermediaries, and that there has been concern that this possibility could create a means for the abuse of such entities. As previously discussed in the Working Group,[54] potential solutions for this problem could include the broad sharing of information provided upon the registration of an entity (within the parameters of applicable confidentiality and data protection laws) on both a domestic and international level, as well as adherence to international standards created for the purpose of combating money-laundering, terrorist financing and other related threats.[55]

Information required in the formation document

37. Other matters to be considered in a discussion of formation of the business entity would be the information that is required to be submitted to authorities for valid formation of the entity (for example, the name of the entity and members and board members, the mailing address and domicile of the entity and any dissolution date). Additional optional information could also be included in the formation document submitted by founding members (such as any specific provision for management or conduct of affairs of the entity or any provision in respect of authority to represent the business entity and to legally bind it). In order to achieve additional flexibility, a legal text could also permit the formation document to create a business entity at a future date, perhaps stating a finite period of time within which the creation of a prospective entity formation would be allowed.[56] The requirements for amendment of the formation document should also be set out in the section relating to formation of the entity.[57] In States where a certificate of existence or authorization must be issued for legal formation of the business entity, a provision in this regard could be inserted in this section of the legal text.[58]

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[51] See Working Paper A/CN.9/WG.I/WP.85, para. 54 and Toolkit (2013), supra note 22, pp. 18-19.

[52] Toolkit (2013), supra note 22, pp. 18-19.

[53] Both the MLSBE (article 6) and the MASC (section 5) accommodate both paper-based and fully electronic registration systems.

[54] See Report of Working Group I, A/CN.9/800, paras. 27 and 41.

[55] For a more detailed discussion of the potential for misuse of simplified business forms, see Working Paper A/CN.9/WG.I/WP.82, paras. 26-32.

[56] See, for example, article 5 of the MLSBE. Provision for the future formation of the simplified stock corporation does not currently appear in the MASC, but could easily be added.

[57] See, for example, MLSBE, article 6 and MASC, section 5.

[58] See, for example, MASC, section 8.

C. Relations of members to each other and to the business entity

38. The next main topic that might logically be considered in a legal text in respect of simplified business entities for MSMEs would be the issue of internal governance, i.e. the rules governing relations between members of the business entity and establishing the management of the business entity.

Contributions and liability to make contributions

39. The first issue to be dealt with in this section could be how to become a member of the business entity. This process is usually begun by making the contribution agreed by the prospective member to the business entity, who then becomes a member of the business entity upon its formation. The Working Group may wish to consider what type of contributions to the entity should be permitted; usually, contributions can consist of tangible or intangible property or other benefits provided to the business entity, and may include future services. Each member of a business entity has an obligation to make the contribution promised to the capital of the entity and the member's liability to do so is not excused by death, disability or inability to perform. Rules on contribution are found in article 7 of the MLSBE and section 9 and 10 of the MASC deal with capital subscription and payment.

Distributions to members and liability for improper distributions

40. A related matter for consideration in terms of internal governance is the establishment of rules in respect of distributions to members. Rather than establishing provisions for the allocation of profits and losses among members of the business entity, this issue can be managed by establishing rules for the entitlement of members to distributions. Restrictions are usually placed on distributions to members of the business entity in order to ensure that the entity can continue to operate, such that no distribution may be made unless it passes the insolvency test (i.e. that the entity can continue to pay its debts after the distribution) or the balance sheet test (in respect of which the entity's total assets must exceed its total liabilities after the distribution). Members receiving a distribution in violation of these rules would normally be held liable to the business entity for the amount of the improper distribution if the member had actual or constructive knowledge that the distribution was in violation of the rules. Rules on distribution and liability for improper distribution appear in articles 8 and 9 of the MLSBE.

Shares, voting rights, rights to information, shareholder agreements and meetings, notice and quorums

41. Rules regulating the shares of the business entity or setting out specific rules governing the relations between the members of the business entity (if there is more than one member) would most likely be agreed by members in the operating document. However, it would also be possible to establish gap-filling rules on certain issues in the legal text in the event that the members fail to address them in the operating document. Such rules could include provisions on classes of shares, voting rights, rights to information, shareholder meetings and notice thereof, quorums and majorities, and shareholder agreements.[59]

Management of the business entity and appointment, removal and resignation of managers

42. The Working Group may also wish to consider establishing gap-filling provisions pertaining to the management of the business entity, in the event that members do not address these issues in the operating document. While privately held business entities, and MSMEs in particular, may be more likely to be member-managed than manager-managed, for maximum flexibility, it may be prudent

[59] See, for example, sections 10, 11, 17-22 and 24 of the MASC. Note that the single-member of the MLSBE holds 100 per cent of the ownership of the business entity, and specific rules in respect of shares are unnecessary in that model.

to include rules such as those governing how managers are appointed and removed or resign, the scope of their authority and their standard of conduct in managing the business entity.[60] Examples of how these issues are dealt with may be found in article 10 of the MLSBE and sections 17, 25 and 27 of the MASC.

Protection of minority members

43. In addition, rules governing conflict between members and remedies for abuse of minority members of a business entity could be addressed either here or in a separate section of the text. As noted in documents previously before the Working Group,[61] protection of the minority members of a business entity may be accomplished through the share structure of the business by establishing different classes of shares with identical voting rights that may vote separately as classes for the election of specified numbers of board members, or through cumulative voting, where the minority may cast all of its board of director votes for a single candidate. However, it may be preferable to deter opportunistic behaviour by the majority through the establishment of fiduciary duties, such as the abuse of rights provisions found in section 42 of the MASC.[62]

Conflict resolution

44. Finally, the matter of conflict resolution between members of a business entity may be considered in this section or, again, as a separate topic. As previously noted in documents before the Working Group,[63] conflict resolution among members of a business entity may be dealt with in several different ways. Such mechanisms could include the ability to take a derivative suit, which would permit one or more members to initiate a derivative suit in the name of the business entity and for the benefit of the entity as a whole, or through the establishment of voluntary or involuntary dissociation or exit rules for members.[64] One final matter that the Working Group may wish to consider in this regard is the possible creation of specialized business courts and procedures for dealing with conflicts arising as a consequence of the establishment of the simplified business entity in order to provide MSMEs with less expensive, faster and more highly-specialized adjudication of issues.[65]

D. Relations of members and managers to persons dealing with the business entity

45. The next set of issues that the Working Group may wish to consider is the matter of the relationship of members and managers to persons dealing with the business entity, in effect, the external organization of the business entity. Provisions should be included in a legal text on simplified business entities that clarify who has the power to bind and to represent the business entity, and what actions may be taken by the member or manager (for example, actions in the ordinary course of business), as well as establishing liability for members and managers that exceed their authority.

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[60] The Working Group may wish to note that Working Paper A/CN.9/WG.I/WP.82 contains a comparison of fiduciary duty provisions in the simplified legal regimes analyzed therein (tables on p. 12, paras. 24-25). It should also be noted that a provision on abuse of rights as among members of the business entity may be included in a legal regime as found, for example, in section 42 of the MASC.

[61] See Working Paper A/CN.9/WG.I/WP.82, para. 23.

[62] See also note 60 above. The issue of conflict between members is not relevant to the MLSBE due to its single-member nature.

[63] See Working Paper A/CN.9/WG.I/WP.82, paras. 33 to 40.

[64] See, for example, section 38 of the MASC. Such rules are not necessary in the case of the single-member business entity context as illustrated by the MLSBE.

[65] See, for example, section 39 of the MASC, which provides for conflict resolution by way of arbitration, or any other alternative dispute resolution, or by specialized judicial or quasi-judicial tribunals, as well as the discussion in Working Paper A/CN.9/WG.I/WP.82, paras. 38-40 and in the Report of Working Group I, A/CN.9/800, paras. 60-61.

Examples of such provisions may be found in article 11 of the MLSBE and sections 26, 27 and 41 (piercing the corporate veil) of the MASC.

E. Transferable interests

46. The issue of the transferability of interests in the business entity is of great importance in the context of closely held entities. It may be recalled that previous materials before the Working Group[66] analysed the transferability of interests in the business entity as one of the points of comparison in its survey of various simplified business entities. Generally speaking, the transferability of interests in a simplified business entity is subject to freedom of contract, and members can agree in the operating document on any restrictions on transfer that they deem necessary or desirable. Such limitations could include a requirement that transferable interests not be transferred for a certain specified time or to certain transferees, or that the transfer of certain interests, such as governance rights, be restricted. Again, gap-filling provisions on the transferability of interests in the business entity could be provided in a legal text for situations in which the members fail to address the issue in the operating document.[67]

F. Restructuring

47. The members of a simplified business entity may wish to convert it into another business form permitted under the applicable laws of its jurisdiction, and consideration should be given to this possibility. Restructuring of the business entity should be achieved in the same way as its original formation, i.e. through the will of its members.[68] In such circumstances, the operating document of the business entity should be amended in the appropriate manner to reflect the desired change. The Working Group may also wish to consider whether to include provisions on mergers and on any restrictions on such conversions or mergers that ought to be included in a legal text, for example, in situations where a member of the business entity does not give the necessary approval for the conversion or merger.[69]

G. Dissolution and winding up

48. Any legal text in respect of simplified business entities for MSMEs must also take into account the end of the life cycle of the business entity. To that end, the Working Group may wish to consider events that should appropriately result in the dissolution and winding up of the business entity. Given the freedom of contract of founding members of the entity, events of dissolution could be identified in the formation document, the operating document or by decision of the members of the entity. Other events of dissolution could arise as a result of compulsory liquidation proceedings or by way of a decision rendered by a competent public authority. Provisions in respect of dissolution and winding up are found in articles 14 and 15 of the MLSBE and sections 34 to 36 MASC.

H. Miscellaneous

Financial statements, governing law and any additional matters

49. The final category which the Working Group may wish to consider in the context of issues that should be addressed in the context of simplified business entities is a catch-all category for additional issues. The MLSBE and the MASC include in such

[66] See Working Paper A/CN.9/WG.I/WP.82, pp. 10-11.
[67] See, for example, sections 12 to 15 of the MASC.
[68] See, for example, MLSBE, articles 12 and 13 and MASC, sections 29 and 31.
[69] See, for example, MASC, sections 30 and 33.

a section provisions on financial statements and governing law,[70] but of course, many other issues could be considered for inclusion in this category.

VI. Issues for possible discussion

50. The Working Group may wish to consider the following non-exhaustive list of issues in its discussion:

(a) Is the Working Group of the view that the possible way forward suggested above in paragraphs 5 to 7 would be appropriate?

(i) If not, what alternative approach should be taken to fulfilling the mandate of the Working Group?

(ii) If so, would the approach taken by the draft MLSBE be an appropriate starting point for discussion?

(iii) If the draft MLSBE would not be an appropriate starting point for discussion, is there another text (such as the MASC contained in the annex to A/CN.9/WG.I/WP.83 or one of the approaches set out in A/CN.9/WG.I/WP.87) in respect of which the Working Group would prefer to initiate its discussion?

(b) What additional issues to those set out in the framework in section V above should be considered by the Working Group in fulfilling its mandate?

(c) Following the exploration of the issues above and its previous discussion,[71] is the Working Group in a position to decide on what form its work on simplified business incorporation should take, i.e. a model law with or without a guide to enactment, a legislative guide, or some other text?

[70] See, for example, MLSBE, articles 16 and 17 and MASC, sections 37 and 43.
[71] See the Report of Working Group I, A/CN.9/800, paras. 34 to 38.

(A/CN.9/WG.I/WP.86/Add.1) (Original: English)

Note by the Secretariat on micro, small and medium-sized enterprises - Legal questions surrounding the simplification of incorporation

ADDENDUM

Contents

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I. Introduction

1. As noted in A/CN.9/WG.I/WP.86 (paras. 3 to 4), at its first session, the Working Group emphasized the importance of focussing on the needs of micro businesses in its consideration of the legal issues surrounding the simplification of incorporation. In order to offer the advantages of limited liability, legal personality and freedom of contract to micro-businesses, but to take a simple, low-cost approach, a "think small first" methodology was taken. In that vein, the attached text of a draft model law on single-member businesses enterprises has been prepared.

2. The vast majority of enterprises in the world are one-person businesses. In light of the forces of globalization and economic integration, it is important to strengthen the economic role and position of these businesses, which are usually microenterprises. What legal structure can be created to help these enterprises thrive? When it comes to the organization of these entities, two distinct approaches may be identified. First, many [1] States have modernized and simplified the laws that govern business entities. Second, initiatives have been launched under which smaller enterprises receive certain incentives, including registration exemptions and tax benefits.

3. Against this background, the following questions may be relevant for the consideration of the Working Group: (1) would microenterprises prefer to select a redesigned, but already existing business form; (2) would newly introduced legal forms be better positioned to offer ready-made structures in which smaller enterprises could easily be started; and (3) how many types of legal forms should be made available? There are no uniform answers to these questions, since the list of available legal business forms for privately held entities of all sizes differs from State to State.

4. In this context, a model law on legal business forms should ideally offer enacting States the choice to adopt the model as a unified statute; this approach would clearly achieve the greatest level of harmonization. However, since States may have already enacted business forms for microenterprises or be in the process of doing so, such States could choose to implement one or more features of the draft model law by amending their statutes or legislative drafts. In order to reflect the flexibility of and options open to States in implementing the attached draft model law, the term "business entity" is introduced to capture a range of possible enterprises.

5. The draft model law builds on the presumption that a legislative regime for a ready-made business form should focus on the needs of the smallest one-person entities first (the "think small first" principle). It should be noted that the current draft of the model law does not yet contain definitions nor does it refer to any standard forms; either could be added at a later date, once the Working Group has considered whether or not it wishes to further develop the draft model law.

II. Text of a draft model law on a single-member business entity

Chapter I — General provisions

Article 1. Nature

A single-member business entity may be organized under this law for any lawful activity, including the ownership of property, subject to any law of [*insert the enacting State*] governing or regulating such activities.

6. *Comment* — A single-member business entity may be organized for any lawful purpose unless the enacting State has specifically prohibited a single-member business entity from engaging in a specific activity or in certain regulated industries, such as the banking or insurance industry. If an enacting State wishes to prohibit or exclude certain activities of a single-member business entity (or, for example, to limit its operation to commercial activities), it could be accomplished by adjusting this provision.

[1] For current details, information may be obtained at: www.doingbusiness.org/reforms.

Article 2. Legal personality

A single-member business entity is an entity distinct from its sole member. A single-member business entity has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities.

7. *Comment* — The draft model law on a single-member business entity embraces the legal personality approach in order to give a clear expression to the nature of the business form as a legal entity separate from its members. The status of a single-member business entity for tax purposes should not affect its status as a separate legal entity formed under the draft model law.

8. The draft model law takes the view that the separation between the assets of the single-member business entity and the personal assets of the single-member who owns the business entity is the defining characteristic of the legal personality status.

Article 3. Limited liability

Except as provided by the operating document, if any, the single-member is not solely by reason of being a member liable to any person, directly or indirectly, by contribution, indemnity or otherwise, for any obligation of the single-member business entity.

9. *Comment* — The term "operating document" is the document or electronic record that governs the affairs of a single-member business entity. The operating document, if any, should not have to be filed or disclosed; this is in order to protect privacy and to avoid the need to file amendments with the authorities should the single-member wish to change the entity's operating document. As stated in article 6 of the draft model law, a single-member business entity is formed by executing and filing a "formation document" which requires the disclosure of only a few facts, including the name of the single-member business entity. In the case of most single-member business entities, the single-member will also act as the sole manager and an operating document will not be necessary. The simplicity of such an arrangement should make it more attractive to micro-business sole proprietors.

10. In order to offer a clear and simple framework to economic actors, the single-member business entity offers limited liability protection to its member. The presence of a liability shield generally prevents the single-member from incurring personal liability as a result of activities of the single-member business entity in the ordinary course of the business.

11. There is a wide range of academic literature that suggests that the presence of limited liability introduces the prospect of opportunistic behaviour, i.e., attempts by a member to shift the risk of business failure to third parties or outsiders. Some have suggested that limited liability should not be considered as an essential feature of business entities. Others are of the view that uncertainty surrounding the efficiency of limited liability lends support to introducing special rules and regulations, such as minimum capital and capital maintenance requirements, to protect voluntary and involuntary creditors to the firm (such as tort creditors). However, the reliance on minimum capital requirements to balance the levels of risk-taking may be deceptive. By their very nature, these requirements may impede innovation, business entry and investment, and may consequently create unnecessary barriers to trade and social welfare.

12. In order to provide some protection to creditors and to third parties dealing with the entity, the draft model law includes the principle that the member will incur liability for improper distributions as well as an obligation for the member to repay the single-member business entity for any improper distributions (article 8).

Article 4. Name of entity

1. The name of the single-member business entity must contain the phrase "single-member business entity" or the abbreviation "SBE".

2. The name of the single-member business entity must be distinguishable upon the records of the [*insert the name of the appropriate commercial registry or other body administering business associations under the law of the enacting State*] from the name of any other registered legal entity in [*insert the enacting State*], unless the

use of the name is authorized by the [*insert the name of the appropriate commercial registry or other body administering business associations under the law of the enacting State*].

13. *Comment* — This article is included because certain States provide for the registration (and approval) of company names to enable the appropriate commercial registry or other body administering business associations under the law of the enacting State to prevent the proposed name of the single-member business entity from conflicting with the name of another entity or any trade names.

14. Enacting States may include an article stating that a person may reserve the exclusive use of a name by delivering an application to the appropriate commercial registry or other body administering business associations under the law of the enacting State.

15. The provision in paragraph 2 allowing authorities to authorize the use of a name similar to or indistinguishable from that of another business entity is best understood in the context of micro and small businesses, where two entities could possess similar names but be engaged in very different industries and/or distant geographical areas, and thus be quite distinguishable in fact.

Chapter II — Formation and proof of existence

Article 5. Formation of a single-member business entity

1. One natural person may form a single-member business entity by executing a formation document and delivering it to the [*insert the name of the appropriate commercial registry or other body administering business associations under the law of the enacting State*].

2. Unless a future effective date not more than 90 days after the delivery of the formation document is specified in the formation document, the existence of the single-member business entity begins when the formation document is executed and delivered to [*insert the name of the appropriate commercial registry or other body administering business associations under the law of the enacting State*].

3. A single-member business entity is formed at the time of execution and delivery of the formation document or at a future date specified in the formation document but not more than 90 days after the delivery of the formation document, if there has been compliance with the requirements of article 6.

16. *Comment* — In some enacting States, the formation procedure must be coupled with review of the formal correctness of the formation document by a court, administrative agency or notary, and in such cases, paragraphs 1 and 2 may be adjusted accordingly.

17. Ideally, delivery of the formation document may also be accomplished electronically provided that the information can be retrieved in printed form or in a manner so as to be usable for subsequent reference. If a future effective date not more than 90 days after delivery of the formation document is specified, it is on that date that the existence of the single-member business entity begins. The electronic filing of formation documents enables legal entities to be created without the intervention of professionals, and it might be argued that this trend could increase the potential for misuse of the legal entity (e.g., money-laundering and terrorist financing; see, also, A/CN.9/WG.I/WP.82, paras. 26 to 32). However, it should be recalled that legal entities, in order to conduct activities, often have to open bank accounts that require the submission of taxation and other identification numbers, and financial institutions may remain the most suitable parties to prevent and combat money-laundering and other illicit activities.

18. Article 5(1) allows only natural persons to create a single-member business entity, as this would be the most likely scenario in respect of a micro-business. It would, of course, be possible to extend this provision to include legal persons as well.

Article 6. Formation document

1. The formation document must set forth:

(a) The name of the single-member business entity;

(b) The street address, if any, mailing address and domicile of the single-member business entity;

(c) The name and mailing or service address of each member of the board of management, if any; and

(d) The date on which the single-member business entity is to dissolve, if the single-member business entity is to have a specific date of dissolution.

2. The formation document may also set forth:

(a) Any provision for the management of the single-member business entity and for the conduct of the affairs of the single-member business entity;

(b) Any provision regarding the authority to bind and represent the single-member business entity; and

(c) Any other matters relating to the single-member business entity that the person forming the single-member business entity determines to include therein.

3. The formation document must be amended if the information required in paragraph 1 changes, and may be amended at any time for any purpose the single-member sees fit, by executing and delivering an amendment to [*insert the name of the appropriate commercial registry or other body administering business associations under the law of the enacting State*].

19. *Comment* — It is necessary to disclose the name and mailing address of the single-member and each member of the board of management (if any) in order to enable the appropriate commercial registry or other body administering business associations under the law of the enacting State to adequately monitor and observe their work in respect of the maintenance of the entity's books and records.

20. The single-member and possible members of the board of management of a single-member business entity are required only to provide a mailing or service address rather than a residential address to be registered and available to the public. If an enacting State decides to implement the requirement to provide the appropriate commercial registry or other body administering business associations under the law of the enacting State with a residential address, the residential address should not appear on the public registry (and should only be available to predetermined organizations such as governmental and credit reference agencies). The rationale behind this is that single-members and possible members of the board of management may feel that the public availability of their residential address presents a risk to their safety.

Chapter III — Capital

Article 7. Contributions

1. A contribution may consist of tangible or intangible property or other benefit to a single-member business entity, including money, services performed, promissory notes, other agreements to contribute money or property, and contracts for services to be performed.

2. A single-member's obligation to make a contribution to a single-member business entity is not excused by the single-member's death, disability, or other inability to perform personally. If a single-member does not make a required contribution, the single-member or single-member's estate is obligated to contribute money equal to the value of the portion of the contribution that has not been made.

Article 8. Distributions

1. The single-member is entitled to receive distributions.

2. No distribution may be made if, after giving it effect: (a) the single-member business entity would not be able to pay its debts as they become due in the usual course of business; or (b) the single-member business entity's total assets would be less than the sum of its total liabilities.

3. Distributions may be paid in cash or in property of the single-member business entity.

Article 9. Liability for improper distributions

A single-member who receives a distribution in violation of article 8, paragraph 2 and who knew or ought reasonably to have known at the time of the distribution that the distribution violated article 8, paragraph 2, shall be liable to the single-member business entity for the amount of the distribution.

21. *Comment* — As mentioned in the comment under article 3, it has been observed that minimum capital and capital maintenance regimes may be largely ineffective and may create obstacles for economic actors to start a business. Against this background, enacting States may consider including rules in the area of distributions which assign liability rules for the single-member. Also, enacting States may wish to consider certain variations to the liability rules, such as a statutory obligation for the shareholder to return any distribution that was made to them within one year prior to bankruptcy.

22. The draft model law contains an "insolvency test" in combination with a "balance sheet test". Under the insolvency test the single-member business entity must be able to pay its debts after giving effect to the distribution. The balance sheet test ensures that distributions are only made if the single-member business entity's total assets exceed its total liabilities.

Chapter IV — Organization of the single-member business entity

Article 10. Management of the single-member business entity

1. The business and affairs of every single-member business entity organized under this law shall be managed by the single-member, unless the formation document expressly provides that the management of the single-member business entity is or will be vested in a board of management.

2. An act outside the ordinary course of activities of the single-member business entity may be undertaken only by the single-member by way of written resolution, which must be kept in the records of the business entity for a minimum of 5 years.

3. If there is a board of management, it must consist of one or more natural persons. The number of members of the board of management, if any, shall be fixed by or in the manner provided in the operating document, unless the formation document stipulates the number of members of the board of management, in which case a change in the number of members of the board of management may only be made through amendment of the formation document or as provided in the formation document.

4. The formation document or operating document may prescribe other qualifications for members of the board of management. Each member of the board of management shall hold office until such member's successor is appointed or until such member's earlier resignation or removal.

5. A member or members of the board of management, if any, must comply with the rules of procedure in the operating agreement, and must act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the interests of the business entity and its single-member.

6. Members of the board of management, if any, are appointed by the single-member, unless otherwise provided in the operating document.

7. Any member of the board of management or the entire board of management may be removed, with or without cause, by the single-member or by any other procedure established in the operating document, unless the formation document otherwise provides.

Article 11. Relations with persons dealing with the single-member business entity

A single-member shall have the power to bind and represent the single-member business entity, unless the formation agreement provides that the authority to bind and represent the single-member business entity rests with one or more members of the board of management, if any, or other persons appointed in the manner provided in the formation document. The members of the board of management or persons authorized to represent a single-member business entity may undertake all actions in the ordinary course of business unless the formation document states otherwise.

23. *Comment* — Although it is acknowledged that management activities are conducted by the single-member in most micro-businesses, the draft model law builds on the premise that flexibility should to a large extent govern the internal governance structure of the single-member business entity.

Chapter V — Restructuring

Article 12. Amendments to the operating document

The operating document may be amended only by a resolution of the single-member.

Article 13. Restructuring

1. A single-member business entity may only be converted into any other business form governed under the [*insert appropriate applicable law of enacting State, be it code, decree, law or regulation*] by a resolution of the single-member.

2. The [*insert appropriate applicable law of enacting State*] governing conversion into another form, mergers and split-off proceedings for business associations will be applicable to the single-member business entity.

Chapter VI — Dissolution and winding up

Article 14. Dissolution and winding up

1. The single-member business entity shall be dissolved and wound up whenever:

(a) An expiration date, term or event has been included in the formation document and such term has elapsed, provided that a determination to extend it has not been made by the single-member, before or after such expiration has taken place;

(b) Compulsory liquidation proceedings have been initiated;

(c) An event of dissolution set forth in the operating document has taken place;

(d) Such decision has been made by the will of the single-member;

(e) A decision to that effect has been rendered by any authority with jurisdiction over the single-member business entity; or

(f) Upon the death of the single-member.

2. Whenever an expiration term has elapsed, the single-member business entity shall be dissolved automatically. In all other cases, notice of the dissolution of the single-member business entity must be delivered to the [*insert the name of the appropriate commercial registry or other body administering business associations under the law of the enacting State*].

Article 15. Winding up

The single-member business entity will be wound up in accordance with the [*insert appropriate applicable law of enacting State, be it code, decree, law or regulation*]. The single-member shall act as liquidator unless the single-member, or, in case of the death of the single-member, the executor of the single-member, appoints any other person to wind up the business entity.

Chapter VII — Miscellaneous

Article 16. Financial statements

1. The single-member shall prepare financial statements and company accounts and keep them with the records of the business entity for a minimum of 5 years. If a board of management has been appointed, it shall prepare the financial statements and company accounts for the approval of the single-member.

2. All financial statements referred to in this article shall meet the requirements of the accounting rules and other disclosure requirements of the [*insert appropriate applicable law of enacting State, be it code, decree, law or regulation*].

24. *Comment* — While the focus of the draft model law is on single-member business entities, disclosure and transparency are important issues facing any business organization. While some States apply broad disclosure requirements to closely held corporations (but allow exceptions to be made for small and medium-sized firms), others restrict mandatory disclosure to publicly held firms.[2] In any event, members of closely held entities are generally entitled to substantial information and a right to inspect the company books and records.

Article 17. Governing law

The single-member business entity shall be governed by:

(a) This law;

(b) The formation document; and

(c) The operating document.

[2] While micro, small and medium-sized enterprises are not required to provide the same flow and rate of information as publicly held firms generally, arguably they should have strong incentives for doing so. Indeed, the best run companies, which are more attractive to investors, signal their accountability by supplying information about: (1) the company's objectives; (2) principal changes; (3) balance sheet and off-balance sheet items; (4) financial position of the firm and its capital needs; (5) composition of the management board and company policy for appointments and remuneration; (6) forward-looking expectations; and (7) profits and dividends. However, such considerations are not likely to trouble the micro and very small enterprises contemplated under this draft model law.

D. Note by the Secretariat on Possible Alternative Legislative Models for Micro and Small Businesses - Submissions from Italy and France

(A/CN.9/WG.I/WP.87)

[Original: English]

At the twenty-second session of Working Group I (10-14 February 2014), reference was made to several domestic legislative models applicable to micro and small businesses that provided for the segregation of business assets without requiring the creation of an entity with legal personality that offered limited liability protection (see A/CN.9/800, para. 46). Relevant delegations agreed to submit to the Working Group documents presenting distinctive features of those models with a view to facilitating the understanding of the Working Group in respect of how such features could provide alternative forms of organization for micro and small businesses.

In response to that request, the Governments of Italy and France have submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following materials in order to provide the Working Group with additional information for its deliberations. The materials provided are reproduced as an annex to this note in the form in which they were received by the Secretariat, with formatting changes.

Contents

Annex

I. Italy

[Original: English]
[7 July 2014]

A. Introduction

1. At its twenty-second session in February 2014, Working Group I considered business models alternative to the creation of a limited liability company providing for the segregation of business assets without requiring the creation of an entity with legal personality and limited liability. Within this context, Italy hereby submits a brief description of two legal schemes under its legal system intended to facilitate the performance of economic activities either individually or jointly: (i) constitution of a separate fund dedicated to specific business activities, to be used by sole or multiparty business entities, as well as by individuals or companies according to the type of fund, and (ii) business network contracts, permitting the organization of cooperation among firms with high flexibility and based on contract law instead of company rules.

B. Separate capital fund

2. Under the Italian civil code, debtors respond to their obligations with all their present and future assets. Limitation of liability is only permitted in cases established by law (Article 2740). However, separate funds can be established for a specific purpose, in which case, the funds are specifically devoted to the satisfaction of claims related to the activities carried on to execute the relevant purpose. One kind of separate fund is regulated by Article 167, according to which an individual, or either or both spouses can establish a capital fund (*fondo patrimoniale*) including identified movable and/or immovable assets, which are allocated to the satisfaction of family needs. In this way, the fund is separated from any other assets of the settlor used for business or other matters. In case of insolvency of the settlor, the capital fund is protected. The limit of this institution is that it is conditional upon the existence of a family (since it was not conceived as a tool for businesses, and it can also be established by non-entrepreneurs).

3. Since 2003, corporations can establish capital funds (each) devoted to a specific purpose, or agree that the earnings of an activity be dedicated to repayment of loans obtained for the execution of those activities (Article 2447 bis).[1] The establishment of such a fund is subject to a number of limitations, in particular that it cannot exceed 10 per cent of the equity of the relevant company. Moreover, the company's decision to constitute a fund must clearly state the activities for whose purpose the fund is constituted, the goods included in the fund and a financial plan showing the adequacy of the fund to execute the expected activities. This decision must be made public by way of its registration in the Business Registry, opposition to which may be raised by existing creditors of the company. Once constituted, the capital fund is segregated from other funds of the company and serves only to satisfy claims arising from the relevant activities.

4. In 2006, an amendment to the Italian civil code was introduced making the category of separate funds of a more general nature: according to Article 2645 ter, immovable or registered movable goods can be devoted to a specific purpose to the benefit of a natural or legal person, a public administrative body or other entity as long as it is done by public deed and registered. Once constituted, such a fund is segregated from any other assets of the person or entity. Since this provision states that separate funds can be established for any legitimate interest (*interessi meritevoli di tutela*), this has been read as permitting the use of such instrument for any kind of legitimate business purpose. However, most legal scholars read the provision as prohibiting the establishment of a separate fund exclusively for the

[1] Extension of such provision to limited liability companies is usually excluded by legal scholars.

benefit of the settlor.[2] This implies that a sole entrepreneur would not be permitted to segregate funds to its business activities unless those activities are jointly performed, or a new legal entity is constituted. This in turn implies that only limited companies would be permitted to establish separate funds without the parallel establishment of a separate legal entity.

5. The situation is different in the case of joint business activities. In the case of consortia with external activities,[3] Article 2614 of the civil code permits the constitution of a fund composed of contributions by the members, that can only be used to satisfy claims related to the activities of the consortium itself (*fondo consortile*). This is thus protected from claims of individual members' creditors as long as the claim relates to the activities of the consortium. This applies although the consortium has no legal personality.

6. Finally, separate funds are also permissible for business network contracts, as described in the following section.

7. Separate funds are not common, are subject to a number of limitations and are restrictively applied as an exception to the general principle that liability of a person extends to all its assets. However, the designation of a fund for a specific purpose has now been accepted as a principle under Italian legislation and further developments might be expected.[4]

C. Business network contracts

8. The business network contract (*contratto di rete*) was recently introduced into the Italian legal system by Law Decree No. 5 of 10 February 2009, converted into Law No. 33 of 9 April 2009 and further amended.[5] This is an agreement by which "*more entrepreneurs pursuing the objective of enhancing, individually and collectively, their innovative capacities and competitiveness in the market, undertake a joint programme of collaboration in the forms and specific clusters as they agree in the network contract, or to exchange information or services of an industrial, commercial, technical or technological nature, or to engage in one or more common activities within the scope of their business*" (Article 3).[6]

9. The scope of business network contracts can thus broadly differ, and kind and degree of cooperation are left to the free agreement of parties, as long as, through the determination of a common programme, strategic goals are shared that allow either the improvement of innovative capacity or the growth of competitiveness. Cooperation can range from a plain undertaking to exchange information or services, to the organization of cooperation, up to the joint exercise of economic activities. In addition, the two mentioned goals of cooperation are widely interpreted: improvement of innovative capacity is understood to include any new opportunities that firms may have access to by virtue of belonging to a network, such as the development of new technical or technological opportunities. With regard to the growth of competitiveness, this is generally meant to increase the competitiveness of the members of the network or the network itself at both the national and international level, in the sense of opening business opportunities otherwise precluded to a single firm (such as access to funding, existing fiscal facilitations, or participation in public bids). This leaves the door open to vertical (coordination of suppliers with shared standards of production, distribution or franchise chains), or horizontal integration (research and development, centralized point

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[2] In fact, some scholars limit the scope of this provision to funds established for the purposes of a public interest. Also those who tend not to pose any boundaries as long as interests are legitimate under the law, would yet exclude the establishment of a fund for the sole benefit of the settlor ("*auto-destinazione*"). As for case law, see the latest Tribunale Santa Maria Capua Vetere, decision as of 28 November 2013.

[3] Consortia without external activities have no effect on third parties as they are only enforceable among the parties which undersigned them.

[4] On the other hand, Italy ratified the 1985 Hague Convention on trust in 1989 (Law No. 364/89).

[5] This has been further amended in 2009-2010 (Law No. 99/2009 and Law No. 122/2010) and in 2012 (Law No. 134/2012 and Law No. 221/2012).

[6] As of 1 July 2014, 1,643 of such contracts have been established, involving more than 8,000 entrepreneurs (http://contrattidirete.registroimprese.it).

of sale or of acquisition). Under the most recent amendment to the relevant legislation, business networks can also take part in public bids.[7]

10. Whatever categories can be abstractly drawn in respect of the business functions of network contracts, there is no specific type of network agreement for any of these entities: it is up to the parties to decide the organizational structure and functioning of their network. The sole requirement to enter into a business network contract is to be an entrepreneur, irrespective of the nature and the activities performed. This includes sole ownership, companies of all kinds and public entities, including those of a non-commercial nature, as well as for profit and non-profit entities (mixed networks do not seem to be precluded, where there are for profit and non-profit participants). Business networks, although factually mainly used as a scheme for cooperation of small and medium-sized enterprises, are thus generally open to any businesses, including corporations and groups.

1. Minimum content of the contract and registration

11. A business network contract must specify at a minimum:

(i) The business or corporate name of each participant, as well as that of the network in the event that a common fund is constituted;

(ii) Indication of the strategic objectives of the cooperation and the procedures agreed upon to measure progress towards these objectives;

(iii) Description of the network programme, spelling out rights and obligations of each participant, the means of implementation of the common purpose, and, in the case of a common fund, the measure and standards of evaluation of participants' contributions, as well as its management regulation;

(iv) Duration of the contract and rules for adhesion. Rules for early termination or withdrawal of a participant may also be inserted (in whose absence, general principles on termination of multiparty agreements with a common purpose apply);

(v) Name of the entity, if any, appointed to act as the body responsible for the administration of the execution of the contractor of individual parts or stages thereof;

(vi) Rules for decision-making of participants on any subject or aspect of common interest (not delegated to the body responsible for administration, if appointed).

12. The contract must be in writing, either by public deed or authenticated by a public notary, and be registered with the Business Registry of the place of registration of each of its members. Effectiveness of the contract runs from when the last of the prescribed registrations occurs, both among the contracting parties[8] and against third parties: registration is thus a necessary and essential prerequisite for the legal validity of the contract (*pubblicità costitutiva*). Modifications to the network and the contract need also to be registered in the Business Registry of the member directly involved and must be directly communicated by the manager of the relevant Business Registry to all other Registries involved so as to have the change automatically included in each of them.

13. The contract may also provide for the establishment of a capital fund (*fondo patrimoniale*) and the appointment of a common body responsible for the management, in the name and on behalf of the participants, of activities for the execution of the contract or of individual parts or stages thereof.

2. Separate fund

14. In order to carry out the programme of the business network, contracting parties may establish a common fund. This is a separate fund exclusively devoted to implement the programme of the network and then to the pursuit of its strategic objectives. Creditors of individual participants to the network cannot rely on the fund, which only serves to satisfy claims deriving from the activities performed within the scope of the network. Provisions in

[7] Italian Authority for the Oversight of Public Contracts for Works, Services and Supplies (AVCP), Resolution No. 3/2013.

[8] However, some scholars are of the view that registration only affects enforceability against third parties, the network contract being valid among parties irrespective of its registration.

the civil code on the constitution and effects of a fund in consortia apply, although the exact scope of such reference has to be assessed taking into account that a business network contract, as described above, might involve a much looser cooperation among members, where activities might be carried out individually albeit for a common purpose and under a common programme.

15. As mentioned above, the relevant contract must establish the extent and criteria for the evaluation of contributions. These can be either in cash or in goods and services. The contribution may also consist of a separate fund. In separate legislation, a common fund has also been foreseen for agricultural enterprises establishing a business network, which can in turn contribute to a national mutual fund for the stabilization of returns of this category of entrepreneurs.[9]

3. Governance

16. Governance of the network is left to contractual freedom. If a common body is appointed for the management of the activities of the fund, it will act in the name and on behalf of the network when it has legal personality, or in the name and on behalf of the members of the network if it has none.

4. Legal personality

17. Business networks do not normally have legal personality. However, the most recent amendments to relevant legislation (as of 2012) permit these to also be established with legal personality.[10]

II. France

[Original: French]
[5 September 2014]

A. Introduction

18. At its twenty-second session held in New York from 10 to 14 February 2014, Working Group I (micro, small and medium-sized enterprises) of the United Nations Commission on International Trade Law (UNCITRAL) requested the expertise of the French delegation on the French law applicable to micro-entrepreneurs choosing to operate their business individually (A/CN.9/800, §§ 42-46).

19. This paper is intended as a response to that request.

20. It presents in tabular form the various legal statuses offered by French law to micro-entrepreneurs choosing to operate their business individually. The statuses are presented in ascending order of legal, tax and social requirements.

21. By way of introduction, it should be noted that there is now a broad spectrum of regimes in French law tailored to small and medium-sized enterprises. These legal statuses, many of which are newly created, indicate the legislature's concern to promote the development of small businesses, which are recognized as essential to the growth of the modern economy. The legislative changes were made with a dual aim: on the one hand, to move towards *limited liability of the entrepreneur* in order to reduce the risks involved for the entrepreneur, and thus to lower this barrier to starting a business; and on the other hand, to introduce *greater flexibility in the operation of companies*, which, as legal entities, were previously subject to restrictive rules that were often unsuited to small and medium-sized enterprises.

[9] DL 22 June 2012, No. 83 as converted into Law No. 134/2012.

[10] As of 1 July, 159 business networks have been established with legal personality (http://contrattidirete.registroimprese.it).

1. *Auto-entrepreneur*

22. In addition to the legal measures proper, which will be discussed below, a simplified tax and social treatment has been applied since 2009 to very small enterprises. The status of ***auto-entrepreneur*** is worth mentioning, given the success it has had — in 2013, of the 379,300 enterprises created in France in the form of individual enterprises, 274,900 were *auto-entrepreneurs*. In legal terms, an *auto-entrepreneur* is a standard individual entrepreneur (meeting his/her business debts from the entirety of his/her personal and professional assets), but who has decided to opt, below a certain turnover threshold, for a simplified scheme for the calculation and payment of taxes and social security contributions.

23. The other notable feature of this status is the simplification of registration requirements and formalities, which can be completed online, all of which is aimed at reducing administrative costs and saving time. It should also be noted that online registration is now available for all statuses.

2. *Entreprise unipersonnelle à responsabilité limitée* (EURL, single-person limited liability enterprise) and *entrepreneur individuel à responsabilité limitée* (EIRL, individual entrepreneur with limited liability)

24. Regarding innovations to *limit liability*, the **EURL** is a limited liability company constituted by a single member which limits the member's personal liability to the amount of funds he/she has contributed to the company.

25. Thus, the legal device of a "partner-less company" allowing the single-person enterprise to take the form of a company was the first step towards limiting the liability of the individual entrepreneur. It is true, however, that in practice entrepreneurs continue to prefer operating directly under their own name and to be reluctant to fully utilize this regime. It should be noted that the single-person company regime, the implementation criteria of which are largely open, is applicable to all activities, whether commercial or agricultural, artisanal or liberal. Accordingly, it remains fully relevant and is maintained in parallel with the subsequent legal forms.

26. The law of 15 June 2010 followed a different path in creating the **EIRL**. This regime allows an individual entrepreneur to allocate a certain share of his/her assets to his/her professional activity in order that, in the event of financial difficulty, creditors have access to those professional assets only and not to the entrepreneur's personal assets. The entrepreneur is thus able to constitute professional assets, segregating those assets from his/her non-professional, personal, assets. Prior to the creation of the EIRL regime, the principle of the unity and universality of assets, as strictly defined in French law, was opposed to such segregation.

27. According to the Commercial Code, "[a]ny individual entrepreneur may allocate to his/her professional activity assets segregated from his/her personal assets without having to create a legal entity". The benefit, under the EURL regime, is that the entrepreneur is in fact no longer required to create a separate legal entity. However, as indicated above, the introduction of the EIRL has not ousted the EURL, the two regimes continuing to exist in parallel.

3. *Société par actions simplifiée* (SAS, simplified joint stock company) and *société par actions simplifiée unipersonnelle* (SASU, single-person simplified joint stock company)

28. Regarding greater *flexibility in the organization and operation of companies*, the **SAS** and the **SASU** regimes offer contractual freedom in the manner in which they are organized and operated.

29. The SAS allows very broad operational flexibility, including allowing partners to freely arrange their respective rights without being bound by the rule of proportionality of voting rights to capital held. It should be recalled that the SAS was originally designed to provide a legal framework for enterprises wishing to set up a joint venture. SAS status is also used by start-ups on account of the opportunity it affords entrepreneurs to significantly open up the capital of the enterprise without losing control of it.

30. The SAS, under the SASU designation, may be used as an individual enterprise structure along the lines of the EURL. The SASU is not restricted to large-scale activities, the law of 4 August 2008 on the modernization of the economy having freed the SASU from the requirement of a minimum authorized capital and the obligation to appoint an external auditor.

31. In total, of the 158,900 companies created in France in 2013, 29 per cent were SASs (15 per cent) or SASUs (14 per cent), and 24 per cent EURLs.

B. Activities

Individual entrepreneur			**EURL**	**SASU**
Standard regime	***Auto-entrepreneur***	**EIRL**		
Creator				
Individual entrepreneur			Single member — natural person or legal person — with possibility of another EURL	Single member — natural person or legal person — with possibility of another SASU
Project				
Suitable for small and secondary activities that require little investment	Suitable for small and secondary activities that (i) require little investment and (ii) fall under the tax regime for microenterprises	Suitable for small and secondary activities that require little investment More set-up and operational formalities than for standard or *auto-entrepreneur* regimes	Suitable for all activities More set-up and operational formalities than for EIRL regime	Suitable for all activities More set-up and operational formalities than for EURL regime
Activity				
Any commercial, liberal, artisanal or agricultural activity	Any (i) commercial, (ii) liberal, under Cipav or RSI old-age insurance schemes, or (iii) artisanal activity	Any commercial, liberal, artisanal or agricultural activity	Any activity, except (i) accumulating and savings societies, and (ii) tobacco shops	Any activity, except (i) employment agencies for performing artists and (ii) tobacco shops

C. Capital

Individual entrepreneur			EURL	SASU
Standard regime	***Auto-entrepreneur***	**EIRL**		
Capital				
Not applicable: no capital			Freely determined by single member in company's articles of association	
Subscription of contributions				
Not applicable: no capital			Possibility of contributing (i) in cash, (ii) in kind or (iii) in services or work	
Payment of contributions				
Not applicable: no capital			Contribution in kind: payment on subscription Contribution in cash: (i) obligatory payment of one fifth on subscription, and (ii) payment of surplus within 5 years	Contribution in kind: payment on subscription Contribution in cash: (i) obligatory payment of one half on subscription, and (ii) payment of surplus within 5 years

D. Management

Individual entrepreneur			EURL	SASU
Standard regime	***Auto-entrepreneur***	**EIRL**		
Manager				
Individual entrepreneur			Manager must be natural person and may or may not be single member	Freely determined in articles of association with at least one chairperson who may be natural or legal person, and may or may not be single member
Appointment and removal of managers and term of office				
Not applicable			Freely determined in articles of association or by decision of single member	Freely determined in articles of association
Powers of manager				
Unlimited			Re. third parties: manager has most extensive powers to act on behalf of company Re. members: articles of association may limit manager's powers by requiring prior approval of single member for certain legal instruments or transactions	

Personal liability of individual entrepreneur or single member		
Unlimited Excl. immovable property not allocated to professional activity that is protected by declaration of exemption from seizure	Limited to assets allocated to professional activity	Limited to amount of his/her contribution
	Possibility also of making notarized declaration of exemption from seizure for immovable property not allocated to professional use	

E. Tax regime

Individual entrepreneur			EURL	SASU
Standard regime	***Auto-entrepreneur***	**EIRL**		
Taxation of business profits				
Income tax in BIC, BNC or BA categories	Income tax (i) in BIC or BNC categories and (ii) in accordance with tax regime for microenterprises Option of paying income tax in instalments under certain conditions	Income tax in BIC, BNC or BA categories Possibility of opting for corporation tax if taxed according to (i) *régime réel* [taxation on actual profits], or (ii) *régime de déclaration contrôlée* [equivalent to *régime réel* for enterprises making non-commercial profits] (option irrevocable)	Income tax in BIC, BNC or BA categories in name of single member Corporation tax option (option irrevocable)	Corporation tax Possibility of opting for income tax under certain conditions for SASUs in operation for less than 5 years
Deduction of manager's remuneration				
No		No, unless corporation tax option selected		Yes, unless income tax option selected
Tax regime for manager's remuneration				
Business profits subject to income tax include manager's remuneration		If enterprise is subject to income tax, business profits subject to income tax include manager's remuneration		If enterprise is subject to income tax, business profits subject to income tax include manager's remuneration
		If enterprise is subject to corporation tax, manager's remuneration is subject to income tax in wages and salaries category		If enterprise is subject to corporation tax, manager's remuneration is subject to income tax in wages and salaries category

F. Social security regime

Individual entrepreneur			EURL	SASU
Standard regime	***Auto-entrepreneur***	**EIRL**		
Social security regime of manager				
Self-employed person	Self-employed person, but simplified calculation and payment of social security contributions (microsocial regime)	Self-employed person	Self-employed person if manager is single member *Assimilé-salarié* if manager is third party [*Assimilé-salarié* benefits from social security and employees' pension scheme, but not from unemployment insurance or employment law provisions]	*Assimilé-salarié*
Basis for calculating social security contributions				
Taxable profit	Turnover	If EIRL is subject to income tax: taxable profit If EIRL is subject to corporation tax: net remuneration + share of dividends received above 10% of value of allocated assets, or above 10% of net profit, if this profit is greater than allocated assets	If EURL is subject to income tax: taxable profit If EURL is subject to corporation tax: net remuneration + dividends for part above 10% of capital, share premiums and amounts paid into current account	If SASU is subject to corporation tax: net remuneration If SASU is subject to income tax: taxable profit

G. Operation

<table>
<tr><th colspan="3">Individual entrepreneur</th><th rowspan="2">EURL</th><th rowspan="2">SASU</th></tr>
<tr><th>Standard regime</th><th>Auto-entrepreneur</th><th>EIRL</th></tr>
<tr><th colspan="5">Obligations related to operation of enterprise</th></tr>
<tr><td colspan="2">No specific obligations</td><td>Dedicated business bank account
Separate accounting for professional activity
Publication of annual accounts</td><td colspan="2">Appointment of managers in (i) articles of association or (ii) separate instrument
Special register of decisions of single member
Filing of annual accounts and inventory
Annual management report, unless exempt</td></tr>
<tr><th colspan="5">External auditor</th></tr>
<tr><td colspan="3">No</td><td>No, unless two of the following three conditions are met:
- Balance sheet > €1,550,000
- Turnover excluding taxes > €3,100,000
- More than 50 employees</td><td>No, unless two of the following three conditions are met:
- Balance sheet > €1,000,000
- Turnover excluding taxes > €2,000,000
- More than 20 employees</td></tr>
</table>

H. Start-up formalities

Individual entrepreneur			EURL	SASU
Standard regime	***Auto-entrepreneur***	**EIRL**		
Formalities				
(i) Declaration to CFE and (ii) registration with RCS, RM or RSAC, depending on nature of activity No articles of association	Declaration to CFE, with exemption from registration with RCS or RM in certain cases No articles of association	Declaration to CFE Register declaration of assets allocation with RCS, RM, RSEIRL or RSAC No articles of association	Prepare articles of association CFE issues standard articles of association for EURLs managed by single member (natural person)	Prepare articles of association
Costs of start-up formalities				
RCS registration for traders: around €62 RM registration for artisans: around €185 (this amount may vary from department to department) Registration with Urssaf for liberal professions: free Registration with RSAC for sales representatives: around €26	If exempt from RCS or RM registration: free If not exempt from RCS or RM registration: cf. standard regime If liberal profession: free	Declaration of assets allocation: - Free for traders, artisans and sales representatives if submitted at same time as corporate declaration (otherwise from €42 to €55.65 depending on type of activity) - Auto-entrepreneurs exempt from RCS or RM registration: €55.97 - Liberal professions: €55.97	Publication costs (legal gazette): around €190 RCS registration (including filing of legal instruments): around €84	Publication costs (legal gazette): around €230 RCS registration (including filing of legal instruments): around €84

I. Transfer

Individual entrepreneur			EURL	SASU
Standard regime	***Auto-entrepreneur***	**EIRL**		
Transfer				
Sale of business or client base Business assets transferred to company Business leasing-management, except for EIRL			Sale of business or client base Transfer of shares	Sale of business or client base Transfer of shares

J. Advantages and disadvantages

<table>
<tr><th colspan="3">Individual entrepreneur</th><th rowspan="2">EURL</th><th rowspan="2">SASU</th></tr>
<tr><th>Standard regime</th><th>Auto-entrepreneur</th><th>EIRL</th></tr>
<tr><th colspan="5">Advantages</th></tr>
<tr><td colspan="2">Simple to set up and operate</td><td>Personal liability limited to assets allocated to professional activity
Option of corporation tax regime under certain conditions (option irrevocable)</td><td>Personal liability of single member limited to amount of his/her contribution
Adaptable structure (ability to accommodate new member)
Choice of tax regimes
Simple to operate</td><td>Personal liability of single member limited to amount of his/her contribution
Adaptable structure (ability to accommodate new member)
Choice of tax regimes
Manager under assimilé-salarié social security regime</td></tr>
<tr><th colspan="5">Disadvantages</th></tr>
<tr><td colspan="2">Unlimited personal liability (excl. immovables not allocated to professional activity that are protected by declaration of exemption from seizure)</td><td>Formalities and costs of set-up and operation greater than with standard or auto-entrepreneur regimes</td><td colspan="2">Formalities and set-up/operational costs</td></tr>
</table>

Abbreviations

BA: Agricultural profits

BIC: Business profits

BNC: Non-commercial profits

CFE: Business formalities centre

Cipav: Interprofessional provident and old-age insurance fund

RCS: Register of companies

RM: Trades register

RSAC: Special register of sales representatives

RSEIRL: Special register of individual entrepreneurs with limited liability

RSI: Social income for self-employed persons

Urssaf: Social security and family allowance contribution collection offices

E. Report of Working Group I (MSMEs) on the work of its twenty-fourth session (New York, 13-17 April 2015)

(A/CN.9/831)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10-14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. Based upon the issues raised in working paper A/CN.9/WG.I/WP.82, the Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation[3] as well as on what form that text might take.[4] Business registration was also said to be of particular relevance in the future deliberations of the Working Group.[5] In order to make further progress in fulfilling its mandate, the Working Group requested the Secretariat to prepare a document setting out best practices in respect of business registration, as well as "a template on simplified incorporation and registration containing contextual elements and experiences linked to the mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly,

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.
[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.88, paras. 5-15.
[3] A/CN.9/800, paras. 22-31, 39-46 and 51-64.
[4] Ibid., paras. 32-38.
[5] Ibid., paras. 47-50.

but not exclusively, as they applied to MSMEs in developing countries."[6] In addition, States were invited to prepare materials outlining their experience in respect of alternative approaches to the challenges of simplified incorporation and supporting MSMEs.[7]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, relative to reducing the legal obstacles faced by MSMEs throughout their life cycle, in particular by MSMEs in developing economies. As agreed at its forty-sixth session in 2013, the Commission reiterated that such work should begin with a focus on the legal questions surrounding the simplification of incorporation.[8]

4. At its twenty-third session (Vienna, 17-21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in working paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, and presentations by representatives of the Corporate Registers Forum, the European Business Register and the European Commerce Register's Forum, the Working Group agreed to continue its work on business registration by further exploring the relevant key principles. To that end, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of working paper A/CN.9/WG.I/WP.85 for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group heard a presentation by the secretariat of the Financial Action Task Force (FATF) on its standard-setting activity to combat money-laundering, terrorist financing and other illicit activity, as well as presentations by States of the information contained in working paper A/CN.9/WG.I/WP.87 on possible alternative legislative models to assist MSMEs. The Working Group next explored the legal questions surrounding the simplification of incorporation by considering the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

II. Organization of the session

5. Working Group I, which was composed of all States members of the Commission, held its twenty-fourth session in New York from 13-17 April 2015. The session was attended by representatives of the following States Members of the Working Group: Armenia, Brazil, Cameroon, Canada, China, Colombia, Croatia, Ecuador, France, Germany, India, Indonesia, Italy, Japan, Kenya, Malaysia, Mexico, Namibia, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America, and Zambia.

6. The session was attended by observers from the following States: Finland, Libya, the Netherlands, Peru and Romania.

7. The session was attended by the following non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly: the Holy See.

8. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: World Bank (WB); World Intellectual Property Organization (WIPO);

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[6] Ibid., para. 65.
[7] Ibid.
[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

(b) *Invited intergovernmental organizations*: Organization of American States (OAS);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Society of International Law (ASIL), Commercial Finance Association (CFA), Fondation pour le droit continental, Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT), The European Law Students' Association (ELSA) and The Law Association for Asia and the Pacific (LAWASIA).

10. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Ms. Jennifer Ng'ang'a (Kenya)

11. In addition to the documents presented at its previous sessions, the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.88);

(b) A note by the Secretariat containing a draft model law on a simplified business entity (A/CN.9/WG.I/WP.89); and

(c) Observations by the Government of the Federal Republic of Germany (A/CN.9/WG.I/WP.90).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Legal issues surrounding the simplification of incorporation).
5. Other business.
7. Adoption of the report.

III. Deliberations and decisions

13. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the legal issues surrounding the simplification of incorporation and related matters on the basis of documents presented at its previous sessions and on Secretariat document A/CN.9/WG.I/WP.89, as well as the observations of the Government of the Federal Republic of Germany in document A/CN.9/WG.I/WP.90. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Legal issues surrounding the simplification of incorporation)

14. Prior to recommencing deliberations in the Working Group, it was recalled that the work of Working Group I on MSMEs was of particular relevance in light of the United Nations Post-2015 Development Agenda, since the outcome of such work could be expected to have a major impact on developing countries, whose economic strength depended on MSMEs. It was further observed that an outdated commercial law framework could be an impediment to sustainable development and could make it difficult for States to efficiently mobilize their resources.

15. In keeping with that intervention, it was observed that the focus of the Working Group's efforts should be to support microenterprises in order to foster their establishment and sustainable growth. In that vein, Working Paper A/CN.9/WG.I/WP.90 had been prepared, containing a number of suggested theses that could guide the Working Group in its future efforts. These seven guidelines were summarized as: building bridges to bridge the gaps between different legal traditions; honouring what already existed in terms of company law; focusing on the "think small first" principle to develop the work; finding legal and regulatory tools to establish businesses simply, at a minimal cost and in a trustworthy manner; leveraging important aspects of business registration and limited liability; making information accessible across borders; and focusing on an innovative path that could lead to a legislative guide or toolkit with optional model provisions.

16. Support was expressed in the Working Group for the guidelines suggested in Working Paper A/CN.9/WG.I/WP.90 as a means of developing the work in an appropriate context. However, the Working Group recalled that it had explored the issue of what form its work in respect of the legal issues surrounding the simplification of incorporation should take at previous sessions (see A/CN.9/800, paras. 34 to 38), but that it had not yet made a decision in this regard. Support was expressed for both a legislative guide or toolkit approach and for a model law; the Working Group agreed that both approaches had merits and that it was not necessary to make a decision on the form of the text until its discussions had progressed further.

17. The Secretariat drew the attention of the Working Group to Working Paper A/CN.9/WG.I/WP.89, which contained a draft model law on a simplified business entity as well as commentary on those provisions. The Secretariat explained that it had prepared the document in order to assist the Working Group in its further discussion of Working Paper A/CN.9/WG.I/WP.86 by illustrating how the principles under discussion could appear in a text, should the Working Group decide to prepare a model law. It was explained that the draft model law in Working Paper A/CN.9/WG.I/WP.89 incorporated the decisions made by the Working Group at its twenty-third session (Vienna, 17-21 November 2014), and could be modified to include additional decisions made by the Working Group at the current session.

18. The Working Group recalled the progress of its work at the previous session (see A/CN.9/825), and some additional comments were made in respect of issues that had been discussed at that session. In particular, it was observed that the name of an enterprise need not be unique, provided that businesses with the same name were sufficiently distinguishable, and that requiring a unique name for registration could result in unnecessary delays in registration. A suggestion was also made that care should be taken in identifying the nature of the business entity, as it could have tax ramifications depending on the relevant State. The Working Group then resumed its consideration of the issues presented in Working Paper A/CN.9/WG.I/WP.86, commencing with paragraph 34, as agreed at the conclusion of its twenty-third session.

A. Formation of the business entity

Number of members

19. The Working Group considered the number of members that should be required for formation of a simplified business entity. The Working Group recalled that it had agreed at its previous session (see A/CN.9/825, para. 67) that efforts should be made to agree on a single legal text that could accommodate the evolution of a business entity from a single member model to a more complex multi-member entity. It was observed at the current session that such an approach could have a number of advantages, including reducing transaction costs for single member businesses wishing to grow, and that any text prepared should be structured so as to permit smaller entities to access the rules relevant to them easily, and to disregard more complex rules meant for multi-member business entities. In keeping with its earlier decision, there was general agreement in the Working Group that single and multiple

member entities should be accommodated in the same text, and that there should be no maximum number of members required, leaving such a decision to the policy of the relevant State.

20. Reference was also made to the discussion in the previous session of the Working Group in respect of Working Paper A/CN.9/WG.I/WP.87, which described possible alternative legislative models for micro and small businesses that provided for the segregation of business assets from personal assets without requiring the creation of an entity with legal personality (see A/CN.9/825, paras. 56 to 61 and 74). It was observed that that approach could permit small entrepreneurs to access the advantages of limited liability, even in a multi-member format, without requiring them to incorporate, and could thus be a simpler option for many of them. The Working Group was reminded that it had tentatively agreed at its last session to include a discussion of such options in its further work, including business registration, since those mechanisms generally relied upon public registration to notify third parties of their nature.

Business registration

21. It was observed that the Working Group at its last session had agreed to continue its work on business registration, and had requested the Secretariat to explore in-depth the issues and to distil the principles found in parts IV (Best practices in business registration, paras. 18-47) and V (Reforms underpinning business registration, paras. 48-60) of Working Paper A/CN.9/WG.I/WP.85 (see A/CN.9/825). While aspects of business registration were considered relevant to the exploration of the legal issues surrounding the simplification of incorporation, further consideration of the issues in respect of business registration could be expected to take place at the next session of the Working Group. Rather than pre-empt that discussion, particularly in respect of some of the more complex issues set out in paragraphs 35 and 36 of Working Paper A/CN.9/WG.I/WP.86, the Working Group agreed to delay its consideration of those issues until the broader discussion on business registration had taken place, bearing in mind that there should be consistency in the approach taken.

22. It was observed that the Working Group should note that electronic registration referred to in paragraph 36 consisted of two aspects: online access to the business registry system and the creation of the electronic record of registration. A concern was raised that that reference should be deleted as it did not take into account the fact that not all States had the necessary infrastructure for electronic business registration. However, there was support in the Working Group for the view that paragraph 36 was appropriately balanced in that it did not suggest that electronic registration should be compulsory, but rather suggested that any registration system would have to accommodate both paper-based and electronic means. Moreover, inclusion of electronic registration that might not yet be attainable for every State was nonetheless in line with the forward-looking nature of creating an enabling legal environment for MSMEs and of the work of UNCITRAL generally. It was further emphasized that electronic registration afforded many advantages, including transparency, deterrence against corruption and money-laundering, efficiency and convenience.

Information required in the formation document

23. The Working Group next considered paragraph 37 of Working Paper A/CN.9/WG.I/WP.86 concerning which information should be required in the formation document to be submitted to authorities for the valid formation of the entity, and which information could be submitted at the option of the founding members. It was observed that the key issue in this regard was to provide for transparency, since such information would be the only information that would be publicly available. It was suggested that such information should include not only the name of the entity, the location of the entity and the names and residence of the founding members and of each member of the board of management, but that the formation document should also require disclosure of those authorized to represent the business entity and to legally bind it. There was some support for that view. Others suggested that in order to avoid bureaucratic hurdles that could discourage

formalization, information required in the formation document and subjected to transparency should be the minimum necessary to identify the entity and to permit its operation; additional non-essential information could be located in the operating documents rather than the public registry. There was also support for that view in the Working Group.

24. The view was also expressed that the names of all shareholders of the entity should also be included in the formation document, or otherwise be publicly available. Concern was expressed that this information might not be available at the time of formation of the business entity, and that such a requirement could create a burden for smaller closely held businesses. In addition, it was observed that some States would prefer not to disclose that information, and that it should be a policy choice that should be left to the implementing State. Caution was urged that the more onerous transparency requirements for publicly traded companies should not be extended to privately held ones, particularly to those micro and very small entities that were intended to benefit from the efforts of the Working Group.

25. A view was also expressed that the most important purpose of the information required of an entity concerned its creditworthiness and that information on the assets of the entity was vital for that purpose. It was observed that such an asset-based registry could be linked to the business registry in order to assist micro and small businesses, but that such asset information was separate from the information that should be required in the formation document.

26. The Working Group was urged to focus on the theme of "think small first" in its consideration of what information should be required in the formation document. There was support for the suggestion that the focus of the discussion should be on what information should be required of the very smallest entity in order for it to operate successfully, bearing in mind that many such micro and small informal businesses were already operating successfully, including in cross-border trade. It was suggested that three aspects of particular importance in terms of transparency for such an entity were the identity of the entity, the identity of its founding members, and information on how that entity was controlled by its members.

27. The Working Group concluded its consideration of what information should be required in the formation document of a simplified business entity in order to achieve the valid formation of the entity, and which information should be optional. Although it did not reach agreement on those matters, the Working Group was of the view that the broad expression of views was useful and that it could return to consider some of those issues after other aspects of Working Paper A/CN.9/WG.I/WP.86 and other documents were considered.

B. Possible reconsideration of working methods

28. Following its consideration of the issues above in respect of the number of members required for the formation of the business entity, certain aspects of business registration, and information that should be required in the formation document, the Working Group assessed whether it might be advisable to adjust its working methods. In particular, the Working Group considered whether it should continue discussing the framework of issues set out in Working Paper A/CN.9/WG.I/WP.86, or whether it would be of greater assistance to the Working Group to instead consider those issues as illustrated in the draft model law on a simplified business entity contained in Working Paper A/CN.9/WG.I/WP.89 and by A/CN.9/WG.I/WG.83. A view was expressed that considering the latter would be more appropriate at the current session, since Working Paper A/CN.9/WG.I/WP.89 contained provisions that were more specific in nature and therefore might better assist the Working Group in structuring its discussion of those issues. However, there was support in the Working Group for the position that at that point in the deliberations there remained several conceptual issues in Working Paper A/CN.9/WG.I/WP.86 that had yet to be discussed and determined, and that decisions on such issues were considered important in providing guidance on future discussions, including on A/CN.9/WG.I/WP.89. It was also said

that Working Paper A/CN.9/WG.I/WP.86 contained many policy considerations that, although complex, were nonetheless likely to resurface in later discussions were they not considered at an early stage. The Working Group decided to continue with its deliberations on Working Paper A/CN.9/WG.I/WP.86.

C. Relations of members to each other and to the business entity

Contributions and liability to make contributions

29. The Working Group recalled that it had at previous sessions considered the issue of the advisability of a minimum capital requirement for simplified business entities (see A/CN.9/800, paras. 51 to 59 and A/CN.9/825, paras. 75 to 78), and that while it did not wish to reiterate that discussion, there were certain aspects of it that could be said to touch upon the issue of contributions to the business entity by the founding members. In particular, it was observed that in order for the business entity to operate, it would have to have some sort of contributions from founding members. In response, it was noted that a business entity did not necessarily have to possess assets at its formation, since assets would be generated through the operations of the entity. In addition, it was noted that contributions of members could take many forms, including current or future agreements to contribute cash, tangible or intangible property, services, skills or labour. It was noted that a mandatory minimum amount of contribution, a requirement in respect of when the contribution must be made and strict rules on the form of the contribution could present obstacles to micro and small enterprises. In addition, it was further clarified that the purpose of including rules on contributions was to permit founding members of an entity to agree among themselves on what they would contribute to the business, but that such rules should not be mandatory; there was support in the Working Group for that view.

30. In response to the question of how the obligation to contribute could be enforced outside of the contractual relationship between the members, it was observed that some States had provisions in their company law that penalized a failure to contribute in the promised form and at the promised time by depriving the member of their right to participate as a member of the entity. A concern was expressed that the regimes described might not provide sufficient protection to third parties when no contributions were necessary at the formation of the business entity. In addition, the view was expressed in the Working Group that the value of contributions should be assessed in order to determine what distributions could properly be made; however, this approach was cautioned against as a possible incursion into matters best left regulated by insolvency rules.

Distributions to members and liability for improper distributions

31. The Working Group next considered the issue of what rules might be established to effect distributions to members, and whether restrictions should be placed on distributions to members of the business entity in order to ensure that the entity could continue to operate following the distribution. Approaches to control improper distributions were said to include the insolvency test and the balance sheet test (both of which were illustrated in article 9(3) of draft model law on a simplified business entity in document A/CN.9/WG.I/WP.89), which some were of the view might be too complex for micro and small enterprises, as well as the requirement that a business entity keep a certain minimum amount of money as a reserve fund that could not be properly distributed to members. It was noted by one State that although it had abolished the minimum capital requirement for the establishment of a business entity, it nonetheless maintained legal capital as the standard of distribution.

32. The Working Group also considered how liability for improper distribution should be imposed. It was noted that article 11 of the draft model law on a simplified business entity in document A/CN.9/WG.I/WP.89 established the liability of a member for having received improper distributions. In addition, it was thought that there should be a specific rule beyond a general liability provision in order to establish the liability of managers in the case of improper distributions. A suggestion was also

made that provisions could be included to establish a default regime for the situation where members fail to agree on how to share distributions, profits and losses.

D. Adjustment of working methods

33. Prior to the commencement of its discussion on the next section of Working Paper A/CN.9/WG.I/WP.86 concerning shares, voting rights, rights to information, and shareholder agreements and meetings, it was observed that those considerations might be too complex to be applied to the MSME context. The Working Group was reminded of the importance of fostering MSMEs, particularly in developing economies, and that to do so it would be best to keep the formalization process as simple as possible. It was emphasized that the "think small first" paradigm was an important guiding principle, but that it should not directly translate into a one-size-fits-all approach, given the wide range of legal traditions and market conditions that existed in various economies around the world.

34. In light of those observations, the Working Group reconsidered how best to accommodate the very simple rules needed by single member entities in a legal instrument along with more complex provisions for multi-member enterprises. A suggestion was made that the Working Group could continue to deliberate on the assumption that the legal text would contain two types of provisions: a set of common provisions that was applicable to both single and multi-member entities and another set of more complex provisions that was applicable only to multi-member entities. Articles 1 through 6 in the draft model law in Working Paper A/CN.9/WG.I/WP.89 were suggested as common provisions that could be applicable to both single and multi-member enterprises. It was further suggested that in light of those considerations, Working Paper A/CN.9/WG.I/WP.89 might be a better document on which to continue deliberations, bearing in mind that simple rules might also suffice for multi-member entities, depending upon the complexity of the business.

35. After discussion, it was decided by the Working Group that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided.

E. Articles 1 to 6 of A/CN.9/WG.I/WP.89

Article 1. Nature

36. A concern was raised that the term "commercial" might not be broad enough to include the full range of MSME activities that ought to be covered by the text; for example, in some legal traditions, the term might not include activities in the agricultural or handicraft sector. It was observed that that shortcoming could be remedied through mention in the commentary of those additional sectors that were intended to be included. An additional suggestion was that the term "commercial" could be replaced with the word "business", as the latter was said to be more inclusive. The Working Group was in agreement with those suggestions.

37. Questions were also raised regarding whether the phrase "including the ownership of property" was necessary and whether it was in the appropriate provision in the text. By way of explanation, it was noted that the phrase was intended to address certain jurisdictions in which the ownership of property was not considered to be a commercial activity. Since the Working Group had decided to refer to "business activity" instead of "commercial activity", it agreed that the phrase could be deleted and the concept moved to the commentary in respect of article 2, as necessary.

38. A recommendation was also made that, although the Working Group had previously agreed to use the term "simplified business entity" as a neutral term, or "simplified company" (see A/CN.9/825, para. 68), the phrase "simplified company" should be used throughout the text instead of "simplified business entity". It was stated that, as a practical matter, the term "company" was more familiar to the

business world, especially in developing countries. Concerns were expressed with this proposal, in that the term "company" was said to carry with it certain connotations depending upon the legal tradition of the State, and it was suggested that the term "business entity" might be a more neutral choice. It was observed that regardless of which term was chosen in the text, the State implementing the provisions would choose an appropriate term in its enactment of that text. It was further suggested that square brackets could be inserted around the phrase "simplified business entity" where it appeared in the text; although there was support for the use of the term "simplified business entity", it was agreed that it could be placed in square brackets pending agreement by the Working Group on it or another term.

39. In response to questions raised in respect of the intended meaning of the terms "operating document" (which appeared in paragraph 9) and "formation document" in the draft text, it was explained that in order to avoid confusion with existing legal concepts and legal traditions, UNCITRAL instruments often sought neutral terminology to be used instead. As explained in paragraph 12 of Working Paper A/CN.9/WG.I/WP.89, an "operating document" was intended to be the document or electronic record that governed the affairs of the simplified business entity, and would include articles of association, bylaws and other similar instruments, while the "formation document" was the instrument necessary to create the simplified business entity, the contents of which would be submitted to the business register and would be made public. It was noted that the legal regime in some States did not have two separate documents that corresponded to the two described, but rather a single instrument. In that connection, it was agreed that the important feature to be preserved in the draft text was not necessarily that two separate instruments were required, but rather was in respect of the contents of the instruments and which aspects of the information contained in them would be required to be made public. It was observed that that discussion could be pursued in greater detail when the Working Group considered article 6 on the contents of the formation document.

40. It was also suggested that a phrase to the effect of "unless otherwise provided by law" be added to the end of article 1. Although this issue was not taken up by the Working Group at the current session, the delegation proposing it reserved the right to return to this point in future discussions.

41. A concern was raised that the current title of article 1 of the draft text, "nature", did not appropriately reflect the content of the article. Various suggestions for its replacement were made, including, inter alia, "scope", "sphere of application", "definition", "goal" and "purpose". A view was expressed that "goal" or "purpose" might not be appropriate, as draft article 1 did not purport to aspire to a specific goal or purpose. After deliberation, the Working Group agreed to replace "nature" with "scope" as a preliminary title of article 1, subject to any developments that might arise as a result of future discussions on the draft legal text.

Article 2. Legal personality

42. It was suggested that the current text of draft article 2 did not sufficiently reflect the desired capacity of the simplified business entity, and that additional powers should be added along the lines of its ability to own tangible and intangible assets and to acquire rights and assume obligations. There was support in the Working Group for that proposal, and for the suggestion that ideas along these lines should be collected for future consideration by the Working Group. A list of potential additional powers to be added to the provision was also suggested, based on existing legislative models, but the Working Group was reminded that while it was desirable to have a comprehensive approach, that goal should be balanced with the need for simplicity.

43. The Working Group was reminded that, as noted above in paragraph 36, it had previously considered the inclusion under a possible MSME scheme of entrepreneurs and individuals operating in the agriculture and handicraft spheres, and doubts were raised that the current draft text could accommodate their inclusion. It was also recalled that the Working Group had at its last session received information in respect of certain domestic legislative models applicable to micro and small businesses that

provided for the segregation of business assets without requiring the creation of an entity with legal personality yet nonetheless offered limited liability protection (Working Paper A/CN.9/WG.I/WP.87). It was suggested that the Working Group had agreed to focus on limited liability, but that there was as yet no such agreement in respect of legal personality. However, caution was also expressed that attempting to include such a broad array of possible businesses in the draft text could result in confusion on the part of third parties interacting with the business entity, and that it might be clearer to limit the draft text to separate legal entities. Moreover, it was recalled that the Working Group could agree to include in explanatory materials a description of those successful regimes that permitted entities with limited liability but no legal personality, and it was agreed to take note of those issues more generally in the commentary or accompanying materials. It was also stated that the first sentence of paragraph 11 of the draft text in A/CN.9/WG.I/WP.89 might require clarification, in that the defining characteristic of legal personality was the capacity to exercise certain rights rather than the segregation of personal and business assets.

44. In addition, delegations were urged to inform the Working Group of any statistics and information they had in respect of the success of various alternative legal forms. In that regard, it was noted that it would also be instructive for the Working Group to receive information in respect of the extent to which alternative regimes enjoyed the support of banking practice in the States in which they were employed.

45. Although it was suggested that the first sentence of article 2 could be deleted in light of the earlier discussion on legal personality, there was strong support for its retention in the draft text. It was observed that the sentence set out clearly the delineation between the artificial business entity and the natural entity, and that to remove it would be to deprive the draft text of a concept of fundamental importance. In light of those considerations, the Working Group agreed to retain the first sentence of draft article 2.

46. A related suggestion was made to add the words “and capacity” to the title of article 2 of the draft text, so that it would read “legal personality and capacity” in order to better reflect the content of the draft provision. Following deliberation, the Working Group agreed to retain the current title, “legal personality”, as the title of draft article 2.

47. In response to a question whether rules in respect of when the legal capacity of a simplified business entity began and ended should be included in draft article 2, it was observed that article 5 of the draft text established the formation requirements for the simplified business entity, and that it would come into existence upon registration, and cease to exist when it was struck from the register. A concern was expressed that draft article 5 might not be sufficient for that purpose.

48. A suggestion was made to replace the term “shareholder” with “member” in article 2 of the draft text, as the former could have a restrictive meaning whereas the latter was more system-neutral and inclusive. That suggestion gained widespread support and the Working Group decided to use “member” in lieu of “shareholder” throughout the text, as well as to bear in mind that the text should take care to include both single and multi-member entities.

49. A proposal was also made that the draft text could be clarified through the deletion of the phrase “and the power to do all things necessary or convenient to carry on its activities” from the end of draft article 2. That proposal was not taken up by the Working Group.

50. In response to the recurring discussion of potential tax repercussions in specific States associated with the use of the concept of legal personality, it was observed that the Working Group should refrain from drafting the text around the tax laws of any State. It was said that, while cognizant of the need to remove as many legal obstacles as possible, an overemphasis on tax-related issues ought to be avoided as the Working Group was endeavouring to develop a system-neutral legal instrument. In response, it was suggested that corporate double taxation was a concern for some States and that

although tax issues need not be directly addressed in the draft text, potential obstacles of this type ought to be identified in the commentary.

Article 3. Limited liability

51. The Working Group next considered draft article 3 on limited liability and the commentary associated with it. In preliminary discussions, it was observed that the concluding sentence of paragraph 14 did not appear to present a balanced view, and that it should be adjusted accordingly. It was also suggested that draft article 3 could be amended to establish separate rules for a single member entity and for a multi-member entity, but that proposal was not taken up by the Working Group.

52. Some support was expressed for article 3 as drafted, although it was observed that an operating document might consist of an oral agreement, and that "operating agreement" might be a more suitable phrase in the text. However, a number of delegations expressed concerns over the opening phrase of the draft provision, "except as provided by the operating document". It was observed that the draft provision as a whole appeared to cover two different types of liability: the "external liability" that was an obligation of the simplified business entity to creditors or other third parties, and for which a member could not be personally liable, and the "internal liability", consisting of debts as between members of the simplified business entity, and which could be covered by a members' agreement. The draft provision appeared to mix the two types of liability, and it was noted that these two types of liability could be separated out in a future draft for additional clarity. Since the operating document was not necessarily intended to be disclosed to the public, the opening phrase of the draft article was thought to be particularly problematic in light of the effect it could have on unsuspecting third parties. The Working Group agreed that the opening phrase of draft article 3 should be reformulated as a separate provision.

53. The Working Group heard various initial proposals for text that could be substituted for draft article 3. One such proposal was: "members of the simplified business entity shall not be held liable for any obligation of the simplified business entity, with the exception of piercing the corporate veil." Another proposal was: "a member of this simplified business entity is not liable except for its contribution to the entity," with a note in the commentary that the member would nonetheless remain liable for certain actions, such as tortious ones or personal guarantees.

54. In order to assist the Working Group in further focusing the discussion, several observations were made. The Working Group was encouraged in its consideration of a text on a simplified business entity to bear in mind who its target audience was; in effect, was it aimed at microsized business or was it to establish a more uniform legal form for a business entity that was more of the small or medium size? Other questions raised were whether in the developing country context, the goal was to reform and simplify outdated company law regimes or to provide a separate and innovative approach based on the collective domestic experience of delegations, but specifically tailored to MSMEs. There was broad agreement in the Working Group that the goal of the work should be the latter. In that vein, it was further clarified that the text should enable MSMEs to access the formal economy as quickly and affordably as possible, and to provide benefits for informal MSMEs making the transition to a formal entity by providing them with limited liability and legal personality. It was also observed that the optimal solution might be to draw ideas from corporate law reform to create a legal text that was capable of standing on its own and was not dependent on existing company law, however it was also suggested that it might be advantageous to link to existing company law in order to generate confidence in the legal underpinnings of the business entity by stakeholders such as banks. The Working Group agreed in general with that articulation of its goals, but specified that while it recognized that a more formal business form with legal personality was most suited for treatment in the text being discussed, it did not wish to discard the possibility of providing additional advice for States in the context of micro and small entities, particularly in terms of solutions where legal personality was not required, such as those explored previously in Working Paper A/CN.9/WG.I/WP/87.

55. There was broad agreement in the Working Group that it would be useful to consider draft article 3 in light of three main issues. The first aspect of the provision was to establish that the liability of members of the simplified business entity to third parties was limited such that an obligation of the entity did not transfer to its members. The second matter to be treated in the draft provision was to establish the obligation, if any, of the member of the simplified business entity to contribute to the capital of the entity. Thirdly, the draft article could address the relationship among the members of the simplified business entity concerning liability.

56. It was suggested that a fourth matter could be added to the above analysis, in that the Working Group could also consider in the provision on limited liability the situations in which the corporate veil would be pierced and limited liability for members of the simplified business entity would be lost. However, there was general agreement in the Working Group that rules on piercing the corporate veil were quite detailed and could vary widely from State to State, such that it might not be productive to attempt to establish such standards in the draft text, outside of noting the potential importance of such a remedy in the commentary and leaving establishment of standards on it to enacting States. It was also observed that piercing the corporate veil was one of several approaches that the Working Group had identified previously as a means of ensuring third party protection in cases where there was an abuse of limited liability, including those listed in footnote 17 of Working Paper A/CN.9/WG.I/WP.89.

57. It was proposed that text for draft article 3 along the lines of the following text might appropriately deal with the four issues outlined in the previous two paragraphs:

(a) A member is not solely by reason of being a member liable to any person, directly or indirectly for any act or obligation of the simplified business entity;

(b) A member is liable to contribute to assets of the simplified business entity as provided by the operating document, or as required by law;

(c) A member may be liable to the simplified business entity or to other members in respect of the acts or obligations of the simplified business entity if provided by the operating or other document.

58. By way of additional clarification of the suggested text in the paragraph above, it was noted that delegates had made it clear through their interventions that rules in respect of piercing the corporate veil tended to have a very specific domestic context, and thus were not susceptible to a generalized treatment in the text. However, by inclusion of the phrase “as required by law” in subparagraph (b), those domestic solutions could nonetheless be included to qualify the provision.

59. An alternative drafting suggestion for draft article 3 was made along the lines of the following:

(a) The members of the entity are not personally liable for the debts of the entity, provided there is no abuse;

(b) The members of the entity will be liable for the losses of the entity only to the extent of their contributions to the entity;

(c) The members of the entity will be liable for the losses of the entity in proportion to the amount of their contribution, unless there is an agreement that says otherwise.

60. Although some concern was expressed that issues relating to the contributions of members should be dealt with elsewhere in the draft text, such as in conjunction with draft article 12, there was general agreement that the suggested approaches provided an acceptable basis on which to pursue future discussion.

Article 4. Name of entity

61. There was broad support for the current wording of draft article 4, paragraph 1, which made it mandatory for a simplified business entity to contain a phrase or an abbreviation that distinguished it from other business entities and signalled its status

as a simplified business entity with limited liability. The Working Group accordingly agreed to retain that text.

62. A suggestion was made to require simplified business entities to include a reference to their limited liability (i.e. the phrase or abbreviation mentioned in article 4, paragraph 1) in their correspondence with third parties (e.g. contracts, invoices, negotiable instruments or orders for goods and services). It was said that this measure reflected an important policy objective of enhancing legal certainty and protecting third parties who wished to enter into business with simplified business entities from abuse of limited liability as it would put them on notice of the simplified business entity's status. In addition, failure to fulfil the requirement would not require a specific sanction except for being denied the benefit of limited liability. However, some delegations were of the view that although such a requirement could assist legal certainty, it need not be mandatory and that it could create an additional burden on simplified business entities by increasing their cost of compliance and verification, thus potentially hindering efficiency. After discussion, the Working Group agreed to include those considerations in the commentary to article 4 in order to leave the details of any regulation to enacting States. Specifically, the commentary would explain the need to protect third parties from potential abuse of limited liability by putting them on notice that they were dealing with an entity possessing that status, while exercising caution so as not to burden simplified business entities, particularly those in developing countries, with additional administrative costs. It was agreed by the Working Group that it might have to revisit this issue when it discussed protection of third parties at a future session.

63. With regard to draft article 4, paragraph 2, it was stressed that requiring a simplified business entity to have a unique name in order to register was of fundamental importance so as to protect other businesses as well as the registering entity itself. In response, the Working Group was cautioned against developing provisions that dealt with matters that were traditionally governed by domestic law, as was said in this case (i.e. that most States had their own rules that dealt with dual, confusing or prohibited names in business registration). The Working Group heard from several delegations on various approaches of different legal systems in handling the issue of distinguishability between names of entities. The Working Group was also advised of recent technological developments that enabled registration of similar or prohibited names of business entities without duplication or confusion, and of the possibility of using a unique identifier as another means of avoiding duplication. After deliberation, the Working Group agreed to include the substance of paragraph 2 in the commentary and to leave the specific method of attaining distinguishability of names for enacting States to decide.

Article 5. Formation of a simplified business entity

64. It was suggested that in order to preserve the simplicity of the proposed text in light of its intended audience, draft article 5, paragraph 1, should only permit natural and not legal persons to form a simplified business entity. That suggestion was not taken up.

65. Concerns were raised in the Working Group that the draft text as currently prepared was not satisfactory in terms of providing that a simplified business entity was formed at the time of execution and delivery of the formation document, and that the appropriate moment of formation was instead at the time of its registration. There was broad agreement in the Working Group that the preferred time of formation was at the moment of issuance of the certificate of registration of the simplified business entity. In response to concerns that the text should take care to ensure that unnecessary delays in the issuance of the certificate of registration or arbitrary rejections of registrations were avoided, and the Working Group agreed that the commentary in the text should recommend that the business registry could only reject applications for failing to fulfil specific formal requirements.

66. In addition, the Working Group found the draft text in draft article 5, paragraph 2, permitting a simplified business entity to be formed up to 90 days after

the date of delivery of the formation document to be unnecessary and overly complex for the purposes of the current text. It was agreed that text permitting such future formation be deleted.

67. A concern was also expressed that paragraph 21 of the commentary in respect of the advantages of permitting creation of the simplified business entity without the intervention of intermediaries was not balanced in that the text failed to address the advantages that could be gained from the involvement of intermediaries, and a request was made to adjust the text accordingly in order to make it more neutral. An additional suggestion was that mention should be made in the commentary that while issuance of the business registration certificate might signal the formation of the simplified business entity, no business would be permitted to begin operations without the necessary licenses, but the view was also expressed that licenses were not related to the legal formation of the simplified business entity, and that a discussion of licensing issues might be misplaced in this draft provision.

Article 6. Formation document

68. The Working Group recalled its previous discussion in respect of the distinction between a formation document and an operating document, and its agreement that the important feature to be preserved was not the form of those documents but rather what information in them was to be publicly disclosed (see para. 39 above).

69. The Working Group was in general agreement with the statement that the actual process by which a simplified business entity was formed was determined by cultural, political and historical factors that varied from State to State, as did the level of formality required for formation. However, it was agreed that the key issue to determine once formation occurred, was what minimum information in respect of the simplified business entity was required to be included in this draft provision in order to protect third parties doing business with it. In addition, the Working Group also agreed that the rules in this regard should be as simple as possible in order to encourage compliance, particularly in developing economies.

70. While there was some support for the text of article 6, paragraph 1, as drafted, several proposals were made in respect of information that should be mandatorily included in the registration process and that should be publicly disclosed. It was suggested that the names of members of the simplified business entity should be included; while there was support for that approach, there was also support for the suggestion that it might be too cumbersome to require MSMEs to comply with this requirement since the membership could be quite fluid. In light of that, it was suggested that only the names of the founding members needed to be included at the time of formation. Another suggestion was that the individual contributions of the members should be disclosed, while a more workable alternative was thought to be that the total capital of the simplified business entity should be disclosed, even in the absence of a minimum capital requirement.

71. It was also proposed that information subject to disclosure should include the identity of those authorized to represent and legally bind the simplified business entity, including their appointment and period of office, as well as whether they were entitled to act individually or jointly. Another suggestion was that the management structure of the simplified business entity, assuming it had a formal one, should be publicly available. There was some support for both suggestions.

72. Various additional proposals were made for information that should be required to be publicly disclosed by the simplified business entity upon its registration, including the following:

(a) The purpose clause of the simplified business entity;

(b) Accounting documents; and

(c) Documents related to the constitution of the entity.

73. There was broad agreement in the Working Group that publicly disclosed information should be kept as current as possible, but there were different suggestions

in respect of how that might be accomplished. Suggestions included requiring immediate filing of amendments of the required information, requiring annual updates or updates within specified time periods, and periodic solicitation for updates from the registry, possibly by way of mobile or other communication technology. Concerns were expressed that requiring regular updates of information could unduly burden micro and small businesses. It was suggested that, until updated, the registered information could be considered to be legally binding as against third parties.

74. With regard to paragraph 2 of draft article 6, it was suggested that the provision be kept as simple as possible. One suggestion was to adopt text permitting members of simplified business entities to include in the formation document any additional information they deemed appropriate.

75. The Working Group agreed that their deliberations in respect of draft article 6 should be included in the commentary to the text for further consideration at a future session.

F. Possible structure for a unified legal text on an enabling legal environment for micro, small and medium-sized enterprises

76. The Working Group heard a proposal from several delegations on a possible structure for discussions going forward, outlined below. It was said that the purpose of this proposal was to simplify the discussion and that the list of twelve articles in Part B, paragraph 4, which contained articles that the Working Group had been considering at its current session, might be more relevant to the context of micro and small-sized business entities. It was added that in formulating this structure, caution was exercised to accommodate the wide range of views already expressed by the Working Group and also of the variance in economic and legal systems that existed around the world.

Guidance on the promotion of micro, small and medium-sized enterprises

A. Introduction

B. Toolkit

1. Analysing economic background and existing legislation in the country
   - (a) State of play
   - (b) How does it affect MSMEs?
   - (c) Evaluation: Need for change?
2. “Think small first” approach (including the “drafting principles” of A/CN.9/WG.I/WP.90)
   - (a) Microstructures
     - (i) Single member entities
     - (ii) Alternative models: business network contracts (A/CN.9/WG.I/WP.87)
     - (iii) Mini company
3. Registration: Simple, cheap and trusted (A/CN.9/WG.I/WP.85)
   - (a) Electronic means
   - (b) Low cost
   - (c) Quality of information (“making limited liability work”) v. declaratory systems
   - (d) Making information available across borders

4. Twelve model provisions for a simplified business entity (A/CN.9/WG.I/WP.86, A/CN.9/WG.I/WP.89)

Art. 1 Nature and name

Art. 2 Legal personality

Art. 3 Limited liability

Art. 4 Governance structures

Art. 5 Registration and proof of existence

Art. 6 (1) Single-member

(2) Multiple-member

(3) Shares and distributions

Art. 7 Fiduciary duties

Art. 8 (1) Lifting the corporate veil

(2) Liability of shareholders as against the company

Art. 9 Accounting and financial statements

Art. 10 Simplified restructuring

Art. 11 Dissolution and winding-up

Art. 12 Conflict resolution

5. The legal context surrounding successful MSMEs: taxation, employment, banking and access to credit, insolvency

77. In response, it was said that while the intention behind the proposal — that of rationalizing and simplifying the discussion in the context of MSMEs — was useful in shaping the discussion at hand and for future reflection as the discussions in the Working Group evolved, the suggested structure and content of the proposal might not be compatible with the working method that had already been agreed in terms of the continued discussion of Working Paper A/CN.9/WG.I/WP.89. In particular, it was said that paragraph 1 of Part B and paragraph 5 of Part B (which concerned topics such as taxation and employment) would likely be considered beyond the mandate of UNCITRAL. After deliberation, the Working Group agreed to continue its work on the basis of Working Paper A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal going forward, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage in its deliberations.

V. Next session of the Working Group

78. The Working Group was reminded that its twenty-fifth session was tentatively scheduled to be held from 19 to 23 October 2015 in Vienna.

F. Note by the Secretariat on observations by the Government of the Federal Republic of Germany

(A/CN.9/WG.I/WP.90)

[Original: English]

The Government of the Federal Republic of Germany has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following observations in order to provide the Working Group with additional information for its deliberations. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

Contents

Annex

Observations by the Government of the Federal Republic of Germany

1. Working Group I has, so far, engaged in extensive deliberations on the possible simplification of the registration and incorporation of micro, small and medium-sized business entities. It has become apparent through the twenty-second and twenty-third sessions of Working Group I that a business cannot be separated from its national economic and cultural context. Many countries that take a very liberal approach to business incorporation provide for certain checks and balances outside their company law, namely through business-related regulations on work, banking and insolvency. Other jurisdictions historically consider a company to be governed to a far greater extent by their respective commercial and companies acts, for instance through ex ante preventive measures of justice.

2. In addition, the range of business entities addressed by the mandate, from the most micro to medium-sized entities, poses difficult questions with regard to the level of sophistication of possible provisions for incorporation globally. Extensive contractual freedom might be problematic in countries where founders of business entities lack the education or access to legal counsel to make best use of such freedom. It might also present difficulties in areas where ex post-only provisions against misuse of limited liability pose possible problems for those states seeking to strike a balance between the rights of entrepreneurs and the rights of their creditors, be they voluntary or involuntary creditors.

3. The efforts undertaken by Working Group I have been fruitful in the sense that such aspects have become apparent and have been discussed in great honesty. The Delegation of the Federal Republic of Germany, motivated to further nurture this discussion, would like to present the following seven theses to the Working Group as a possible way forward:

(i) *Building bridges*: In order to bridge gaps between different legal traditions in terms of business incorporation, there might be a need to build the bridge from both sides of the issue. The Secretariat's suggestion to use neutral language and, where possible, explore alternative solutions to existing models might be a powerful tool to find global answers to old questions.

(ii) *Honouring what is already there*: Each and every nation member of the Commission and, more so, every nation member of the United Nations, has a company act. There might be a possible need for amendment of these acts, as seems fit to these nations. A possible UNCITRAL instrument might have an important impact on fuelling such reform. But there is also possible danger that, in fact, the Working Group might be engaging in redundant work for many countries. Globally speaking, innovative ideas for business formalization might be the best offer to make.

(iii) "*Think small first*": It has been made clear in the Working Group that many countries understand the mandate to be growth-oriented. But "thinking small first" is not necessarily contradictory to growth and cross-border trade, especially in terms of the media and services sectors. Catering to the needs of single-member business entities, to sole traders or business network contracts is as likely to enhance growth as is providing for extensive legal provisions designed for future expansion of multiple business partners. In many developing countries, however, limiting the possible legal burdens as much as possible might be a necessary step to enhance formalization in the first place.

(iv) *Simple, cheap and trusted*: Finding a way to set up businesses simply, at a low or minimal cost and in a way that fosters trust by business partners, the banking sector, as well as the public, including tax offices and authorities involved in public procurement, will most likely help to boost formalization. However, company law alone will not suffice; the economic and regulatory environment for micro, small and medium-sized enterprises needs to be shaped accordingly.

(v) *Making limited liability work*: Registration is not merely an administrative process; it should perform legal functions, as the gateway to legality of all business entities above a certain level of complexity. With regard to limited liability, registration should, to the best extent possible, cater to reliable company ownership transparency, preferably performing ex ante checks on the information provided by companies.

(vi) *Making information available across borders*: In a globalized economy where not only the small do business with the big, but there is also a rising demand for international sustainable suppliers among smaller businesses, global access to relevant company information needs to be timely, accurate and up to date.

(vii) *Legislative guide with optional model provisions*: If the Working Group should choose to embark on an effort to prescribe a more innovative path to registration and incorporation of business entities, as suggested above, it should be aware that treading new ground never assures instant success. That being said, as a means of guiding new solutions globally and in the spirit of the best thinking in terms of financial inclusion and economic development, it is recommended that the Working Group formulate its suggestions as a work-in-progress document, allowing legal scholars, lawmakers and the business sector to contribute and enhance such work over time with the aim of achieving the best possible solutions.

II. ARBITRATION AND CONCILIATION

A. Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-first session (Vienna, 15-19 September 2014)

(A/CN.9/826)

[Original: English]

Contents

I. Introduction

1. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[1] (the "Notes") could be considered as a topic of future work.[2] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[3] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010 ("UNCITRAL Arbitration Rules 2010").[4] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the draft convention.[5] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second sessions, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[6]

2. At its forty-seventh session, the Commission further agreed that, in addition to the revision of the Notes, the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[7] The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[8]

3. At its forty-seventh session, the Commission also recalled that it had identified, at its forty-sixth session, in 2013, that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.[9] In relation to that item, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area. The Commission requested the Secretariat to report to the Commission, at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[10]

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[1] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.

[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[4] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 122 and 128.

[7] A proposal for future work in relation to enforcement of international settlement agreements considered by the Commission at its forty-seventh session is contained in document A/CN.9/822.

[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17) paras. 123 to 125 and 129.

[9] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 131 and 132.

[10] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 126, 127 and 130.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-first session in Vienna, from 15-19 September 2014. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Georgia, Germany, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kuwait, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, 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: Bolivia (Plurinational State of), Chile, Costa Rica, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Egypt, Ethiopia, Finland, Latvia, Libya, Netherlands, Norway, Peru, Qatar, Romania, Senegal, Slovakia, Sweden, Ukraine and Viet Nam.

6. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Educational, Scientific and Cultural Organization (UNESCO);

(b) *Invited intergovernmental organizations*: Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociación Americana de Derecho Internacional Privado (ASADIP), Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Centre for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), G.C.C. Commercial Arbitration Centre (GCCAC), German Institute of Arbitration (DIS), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), Queen Mary University of London, School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL), Swedish Arbitration Association (SAA) and Vienna International Arbitral Centre (VIAC).

8. The Working Group elected the following officers:

Chairman: Mr. Michael Schneider (Switzerland)

Rapporteur: Mr. Simon Greenberg (Australia)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.182); (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.183 and A/CN.9/WG.II/WP.184).

10. 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 Notes on Organizing Arbitral Proceedings.

5. Organization of future work.

6. Other business.

7. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.183 and A/CN.9/WG.II/WP.184). 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 notes on organizing arbitral proceedings, based on the deliberations and decisions of the Working Group, and in doing so, to identify specific issues for discussion at the next session of the Working Group. Delegations were invited to contribute proposals and comments to the Secretariat in view of the preparation of a revised draft version of the Notes.

IV. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

A. General remarks

12. With respect to the working method to be followed at the current session, it was suggested that the Working Group should identify areas where a revision of the Notes might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for the next session of the Working Group the first tentative draft of the revised Notes. The Working Group agreed, on the basis of documents A/CN.9/WG.II/WP.183 and A/CN.9/WG.II/WP.184, to identify the topics that might need to be addressed in a revised version of the Notes and to provide suggestions to the Secretariat for drafting such revisions but not to reach any conclusion at the current session.

1. General principles

Principles underlying the Notes

13. The Working Group recalled the mandate given by the Commission at its forty-seventh session and set out above (see para. 1) which provided that in revising the Notes, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.

14. The Working Group recalled that, further to initial discussions on the Notes at the twenty-sixth session of the Commission, in 1993, the Commission finalized the Notes at its twenty-ninth session, in 1996. At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.

15. The Working Group confirmed its understanding that the Notes should retain those characteristics and that the purpose of the Notes should not be to promote any

practice as best practice. It was furthermore said that one of the great advantages of the Notes was their descriptive and non-directive nature that reflected a variety of practice.

Form and structure of the Notes

16. The Working Group considered as a preliminary matter the form and structure of the Notes, and determined that the current form of the Notes ought to be retained but that that matter could be further considered having regard to the revisions to be agreed upon.

2. Possible additional topics

17. As a general matter, the Working Group considered whether matters not currently addressed by the Notes ought to be included.

Other types of arbitration, including investment arbitration

18. It was said that the Notes had not previously distinguished between different types of arbitration, and it was queried whether specific reference or guidance in relation to any type of arbitration (examples such as commodity arbitration and maritime arbitration were suggested), and in particular investment arbitration, ought to be included in a revised version of the Notes.

19. Views were expressed that guidance in relation to investment arbitration should not be addressed in the Notes, on the basis, inter alia, that the Notes should retain their general applicability; that investment arbitration was a relatively small field, and that practitioners in investment arbitration tended to be sophisticated and have specific expertise in that field; and that such work would overly complicate the revision of the Notes. It was also said that although a number of issues tended to be specific to investment arbitration, those issues were largely substantive rather than procedural in nature.

20. Other views were expressed that guidance relating to investment arbitration should be addressed in the Notes, for the reasons that such arbitral practice has developed rapidly in the period since the Notes were first drafted; that investment arbitration implicated several areas of procedure, such as confidentiality and third-party submissions, that might differ from general commercial arbitration; and that distinguishing between investment and commercial arbitration in the Notes could also benefit public knowledge about the difference between those types of arbitration. It was also said that in light of the recent work of UNCITRAL in the field of transparency in treaty-based investor-State arbitration, and given the distinct procedural issues raised by investment arbitrations more generally, it would be advisable to address that specific type of arbitration within the revised version of the Notes.

21. After discussion, the Working Group agreed that there were good grounds for maintaining the general applicability of the Notes. Without prejudice to the aforementioned, the Working Group further agreed to identify during its deliberations on the Notes specific procedural issues that might arise in different types of arbitration, and in particular in investment arbitration, and to consider whether those ought then to be addressed in relation to certain topics of the Notes (see below, paras. 82, 83 and 182-186).

Costs

22. The view was expressed that, in light of the development of rules on fees and costs set out in the UNCITRAL Arbitration Rules 2010, it may be desirable that the Notes reflect guidance contained in that text, and particularly that the arrangements for setting the fees and expenses of the arbitral tribunal and their payment ought to be discussed at the beginning of an arbitration (see also below, para. 75).

23. In relation to the determination of costs, it was suggested that guidance might be provided in relation to whether in-house legal counsel costs ought to be included in the determination of costs, and if so, how those might be calculated. Another

suggestion was made to draw parties' attention to the possible cost consequences of parties' conduct during proceedings. It was furthermore suggested that matters such as responsibility for costs, security for costs and failure to pay advances on costs might also be addressed in the Notes.

Interim measures

24. It was mentioned in respect of interim measures that the Notes could reflect modifications made in the UNCITRAL Model Law on International Commercial Arbitration, (1985, with amendments as adopted in 2006) ("Model Law on Arbitration"), and in the UNCITRAL Arbitration Rules 2010, as regards interim measures.

Technology

25. The Working Group agreed that the Notes ought to reflect changes in technology, and likewise to bear in mind that updates in relation to terminology should not be so specific so as to become quickly obsolete. One suggestion made in that regard was that the Secretariat should eliminate, where possible, any reference to specific means of communication and instead refer only to the functions that various technologies served. It was said in addition that different technologies might require different procedures, which could be addressed further in the Notes. The Working Group left open the possibility of whether a particular note on the subject of technology and its use in arbitration might be warranted (see also below, paras. 38, 39, 91-102, 110, 125 and 159).

Confidentiality

26. A suggestion was made that the Notes could address procedures in relation to dealing with confidential information within the arbitration proceedings (as opposed to the confidential nature of the proceedings itself), such as technological or commercial secrets for which disclosure to the other party was undesirable or explicitly prohibited by law or by other confidentiality undertakings (see also below, para. 88).

Case management

27. It was suggested that robust and early provision be made in the Notes in relation to the importance of an early case management conference to organize the proceedings, and indeed in complex matters the desirability of case management conferences to take place at multiple stages throughout the proceedings. It was suggested that the Notes were in some respect a checklist of issues that might be considered in all or in part for discussion at the case management conference (see also below, para. 33).

B. Introduction (paras. 1-13)

Purpose of the Notes (para. 1); and paragraph 11

28. The Working Group considered whether to consolidate paragraphs 1 and 11 of the Notes as suggested in the comments by the International Council for Commercial Arbitration (ICCA) in document A/CN.9/WG.II/WP.184 (see also para. 20 of document A/CN.9/WG.II/WP.183). It was pointed out that those two paragraphs were complementary, as paragraph 1 framed the positive purpose of the Notes ("to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings"), while paragraph 11 explained what the Notes did not intend to achieve ("the purpose of the Notes is not to promote any practice as best practice"). Merging those paragraphs was said to clarify that both propositions were relevant to the entirety of the Notes. It was also said that consolidating both paragraphs would enable users to better capture the nature and purpose of the Notes. Support was expressed for that proposal, with the precise

drafting (such as whether those paragraphs should constitute one merged paragraph or separate paragraphs) to be left to the Secretariat.

29. As to the question whether additional provisions should be included in the section addressing the purpose of the Notes, a suggestion was made to clarify that (i) a reference to a specific practice in the Notes should not be interpreted to mean it was the only relevant practice, and practices mentioned in the Notes should be assessed on a case-by-case basis by the arbitral tribunal or the parties, as applicable, and (ii) the absence of a reference to a specific practice in the Notes should not be interpreted to mean that such practice would not be acceptable. The Working Group agreed to consider that matter further, as it was said that the lack of reference to "practices" in the Notes might render such guidance redundant.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings (paras. 4 and 5)

30. It was considered whether, in line with article 18 of the Model Law on Arbitration and article 17 of the UNCITRAL Arbitration Rules 2010, paragraph 4 of the Notes ought to include fairness, equality and efficiency as core principles to be adhered to in the conduct of arbitrations. Views were expressed that such principles were obligatory and typically derived from national law provisions, and consequently that including such principles in the Notes would be too prescriptive. After discussion, the Working Group agreed that if the principles could be expressed in a non-prescriptive way, it would be a beneficial complement to the principles already expressed in paragraphs 4 and 5 of the Notes in relation to "flexibility and discretion".

31. The Working Group also considered a number of drafting matters set out in paragraph 22 of document A/CN.9/WG.II/WP.183. It was said that a reference to other arbitration rules in footnote 1 to paragraph 4 of the Notes would not be appropriate, not least as it would be difficult to determine which arbitration rules should be included. Another comment was made that the reference to "discretion" in paragraph 5 of the Notes might not be robust enough in emphasizing the desirability of working with the parties to develop procedural timelines in a timely manner. In all other respects, it was agreed to give the Secretariat discretion to incorporate the other drafting changes proposed in that document, in line with the discussions of the Working Group.

Multiparty arbitration (para. 6)

32. A suggestion was made to re-title paragraph 6, "Scope of application", and to express in that provision that the Notes applied not only to multiparty arbitration, but also to, for example, domestic and international arbitration, arbitrations with both panel of arbitrators and sole arbitrator; complex and simple arbitrations; and ad hoc and institutional arbitrations. In response, it was said that such an enumeration would both broaden the scope in paragraph 6, but likewise would run the risk of not including certain types of arbitration. It was suggested after discussion to delete paragraph 6 altogether and, in the section of the "Introduction" addressing the "Purpose of the Notes", to highlight their general application.

Process of making decisions on organizing arbitral proceedings (paras. 7-9)

33. In relation to the process of making decisions on the organization of arbitral proceedings, it was suggested that paragraphs 7-9 of the Notes ought to be reconsidered, and possibly, linked to provisions regarding the desirability of a case management conference and of establishing a procedural calendar. It was said that the Notes embodied precisely the issues which ought to be discussed at a case management conference (see above, para. 27).

34. It was further considered that paragraph 7 of the Notes should be revised to indicate that, while there may be cases where an arbitral tribunal may decide to organize the proceedings without consulting the parties, the common practice was for the arbitral tribunal to involve the parties in the process and, to the extent possible, seek agreement. It was suggested that consultation between the arbitral tribunal and

the parties should be encouraged, and attention should be drawn to the possible cost implications of excessive consultation.

35. The Working Group furthermore agreed that such consultation between parties and the arbitral tribunal — making clear that in the first instance, parties and the arbitral tribunal should agree on procedural points, failing which it would be for the arbitral tribunal to do so — could be contained in a distinct provision in the introduction to the Notes and superfluous references repeating that matter elsewhere in the Notes be deleted.

36. The Working Group considered whether the reference "to improving the procedural atmosphere" in paragraph 7 of the Notes should be deleted, clarified or replaced with wording such as "fostering a climate of trust". After discussion, it was agreed that the sentiment those phrases expressed was valuable but that the Secretariat was invited to consider inserting modified language that would also reflect the desirability of having the parties input on the organization of the proceedings.

37. It was agreed that words in relation to "venue" (para. 8 of the Notes) should be made consistent further to discussion in relation to the place of arbitration (Note 3; see also below, para. 66).

38. The Working Group furthermore agreed to consider the wording in relation to means of technology as it appeared in this section (for example, in para. 8 of the Notes) and throughout the Notes. One suggestion was made to adopt terminology throughout the Notes such as "communication by electronic means"; another suggestion was made to refer to existing UNCITRAL texts that defined terms such as "electronic communication" (see above, para. 25 and below, paras. 91-102, 110, 125 and 159).

39. It was further suggested that paragraph 8 could provide that meetings can be held with the physical presence of the parties or through means of communication that did not require their physical presence (see art. 28(4) of the UNCITRAL Arbitration Rules 2010), thereby avoiding the need to refer to specific technology (see above, para. 25 and below, para. 159).

List of matters for possible consideration in organizing arbitral proceedings (paras. 10-13)

40. The Working Group requested the Secretariat to amend the headings ("List of matters for possible consideration in organizing arbitral proceedings") of paragraphs 10-13 of the Notes, to differentiate it from the heading of the Table of Contents.

C. Annotations (paras. 14-90)

1. Set of arbitration rules (paras. 14-16)

41. It was considered whether the Notes provided sufficient guidance where parties had not selected applicable arbitration rules in the arbitration agreement.

42. A proposal was made that in such an instance, the Notes should advise that parties select, or that an arbitral tribunal should advise parties to select, arbitration rules, and that the Notes should enumerate the advantage of selecting rules to govern proceedings rather than proceeding ad hoc (see also para. 49 below).

43. It was also said that a list of options available to the parties, including agreeing on ad hoc or institutional rules, or administered arbitration, and the advantages of such options, could be enumerated. In such circumstance, depending on what option parties selected, it was said that it would be useful to highlight that the consent of an institution might be required.

44. Were the parties to select an institution to administer the dispute, or to agree on a set of rules where none had previously been agreed, it was queried whether the consent of an arbitral tribunal that had already been appointed must be sought.

Although it was said that it would be unusual not to seek the consent of the arbitral tribunal, it was also said that the Notes ought not to be prescriptive in that respect. It was also clarified that it was outside the scope of the Notes to provide guidance to arbitral tribunals as to whether or not to accept a choice of rules designated by the parties after the arbitrators had been engaged. A suggestion, that received support, was to include a more general provision such that whenever a decision affecting the arbitral tribunal was made between the parties, that the parties may wish to consult the arbitral tribunal. It was also said that the agreement of the arbitral tribunal would be required.

45. It was considered whether the Notes ought to mention the option of utilizing institutional rules without the arbitration being administered by that institution. It was said that such an approach must be treated with caution as such practice often led to confusion, delays and costs.

46. It was pointed out that the Notes should clarify that the option between ad hoc arbitration and institutional arbitration was not binary, but rather that ad hoc rules such as the UNCITRAL Arbitration Rules could be successfully administered by institutions. In that respect, it was suggested that the Notes could include a reference to the 2012 Recommendations to assist arbitral institutions and other interested bodies with regards to arbitrations under the UNCITRAL Arbitration Rules 2010.

47. In response to a query as to whether the selection by parties of a set of arbitration rules after arbitral proceedings had commenced, either before or after the constitution of the arbitral tribunal, was an exceptional situation, arbitral institutions confirmed to the contrary that such a situation could occur in practice.

48. After discussion, it was agreed that a general approach that could be taken in a revised draft of paragraph 14 would be as follows. First, the advantages of party agreement on a set of arbitration rules, whether institutional or ad hoc, should be highlighted. Second, if parties had not so agreed, the procedure might then be determined in consultation with the arbitral tribunal. Should parties select institutional rules after the arbitration had been initiated, and in particular after the arbitral tribunal had been appointed, it was said to be advisable that the parties verify with the arbitral institution whether its rules could apply and the institution would be willing to administer the proceedings. It was further suggested that the revised draft of paragraph 14 could include a reference to the law at the place of arbitration and its implications for the procedure.

49. It was agreed that paragraph 15, which advised caution as to consideration of a set of arbitration rules when the parties' arbitration agreement had not so specified, was outdated and ought to be deleted (see also para. 42 above).

50. It was suggested that paragraph 16 of the Notes, which observed that agreement on arbitration rules was not necessary, could be moved to the beginning of Note 1 as it reflected the agreement of the parties and consequently should be treated in Note 1 as the starting point for consideration of the issue.

2. Language of proceedings (paras. 17-20)

51. It was considered whether the chapeau language in paragraph 17 of the Notes, which observed that many rules and laws on arbitral procedure empowered the arbitral tribunal to determine the language or languages to be used in proceedings in the absence of agreement by the parties, should be revised to reflect the advantages of a party-selected choice of language or languages.

52. It was agreed to add the words "or languages" after the word "language" in paragraph 18 as it was said to be desirable to retain the option of having proceedings in multiple languages, and likewise to retain consistency with paragraph 17. It was suggested that, where multiple languages were selected, the Notes could highlight issues that might arise, such as the desirability of an authoritative language (for example, in which the award would be rendered), and additional costs and times necessary for translation and interpretation. It was explained that in some arbitrations, the use of multiple languages was possible without the need for translation and

interpretation, for example where the parties were multilingual or from a region where languages were sufficiently similar so as to be understood by other parties from the same region.

53. It was further said that the issue of fairness ought to be raised in relation to matters of translation, and specifically, whether the Notes could or ought to sensitize arbitrators to the difficulties faced by non-native speakers of the lingua franca of the arbitration.

54. In terms of reducing the cost and time involved in translations, an additional suggestion was made to encourage the use of template or key word translations for repetitive documents such as large spreadsheets with alphabetic headings but mostly numeric content.

55. It was generally agreed that certification of translations was rarely required in respect of ensuring the quality of translations, and that advising on matters of certification was fraught insofar as the meaning of the concept itself gave rise to a number of questions. It was said that in any event certification of translations could be mentioned as a rarity and as necessary only in very specific situations.

56. Another issue considered by the Working Group was whether the Notes should indicate that counsel should be conversant in the language of the arbitration. It was suggested that the Notes could flag either that the parties could consider at the beginning of the arbitration which languages should be used by counsel, or alternatively the Notes could address the languages to be used by counsel as an issue arising more generally from the choice of language.

57. A suggestion was made to relocate paragraphs 18-20 of the Notes, in relation to issues specific to translation and interpretation rather than to choice of language(s) per se, to provisions in the Notes that dealt specifically with submissions of written documents and hearings. It was said in response that the advantage of the current location of those paragraphs after paragraph 17 on choice of language(s), was that they would highlight immediately the implications of a choice of language or languages. After discussion, it was suggested that both options could be considered further in a revised draft of the Notes.

58. In relation to the matter of consecutive or simultaneous interpretation, as provided for in paragraph 19 of the Notes, it was said that both practices were reasonably common. It was pointed out that consecutive interpretation had certain advantages, such as permitting immediate verification and, where necessary, correction of interpretations. It was also said that interpretation and translation services were very often arranged by parties and only rarely by institutions, and that that could be reflected in the Notes.

59. The proposed modifications to paragraph 20 of the Notes, as contained in paragraph 41 of document A/CN.9/WG.II/WP.183 were generally said to be acceptable.

60. After discussion, general agreement was expressed that the Notes should highlight the flexibility of the parties in selecting one or more languages, and underscoring that a choice of language or languages had certain consequences, including on the cost and duration of the proceedings.

3. Place of arbitration (paras. 21-23)

61. By way of general matters in respect of the place of arbitration, addressed in Note 3, it was said that that Note could clarify that a choice of arbitration rules might imply a place of arbitration. It was furthermore observed that Note 3 should make clear that the place of arbitration should be determined at the outset of the proceedings if it had not already been agreed.

62. In terms of the difference between a legal place or seat of arbitration and the physical location where meetings or hearings might take place, it was said that the Notes made such a distinction (with paras. 21-22 setting out guidance in relation to

the legal seat, and paragraph 23 in relation to the location of meetings or hearings), but it was suggested that such a distinction could be made more explicit.

63. It was said that making such a distinction more clearly, including for example setting out the difference between legal place and physical location at the beginning of the provision, would provide a great benefit to parties who might not otherwise know that such a difference existed. It was further suggested that the Notes could better address the question of the material and financial implications of the choice of a place of arbitration.

64. It was furthermore said that additional guidance could be included in Note 3 as to the legal reasons for selecting a certain legal seat, such as the relevant jurisprudence of that seat in relation to arbitral procedure, setting aside procedure and/or enforcement and recognition of arbitral awards or arbitration agreements. It was then suggested that the reasons for holding meetings or hearings at a location different from the place of arbitration could be provided for in that Note.

65. A suggestion was made that the Notes should be clear as to the fact that holding a meeting or hearing at a location different from the legal place of arbitration was not an automatic decision, but rather, that such a decision might be made in certain circumstances in relation to factors relevant to that meeting or hearing. It was further pointed out that the law at the place of arbitration in certain jurisdictions required arbitrations seated there to comply with obligations such as having at least one hearing in that place.

66. It was said that different words could be used in the Notes to make the distinction more clear, such as “place” for the legal seat of arbitration and “venue” for the geographic location where the hearings or activity in question was taking place. Other suggestions were made to refer to the place where the award was made, or to the seat of the arbitral tribunal to describe the legal place of arbitration and to refer to the place of the arbitration activities to describe the location where meetings and hearings could take place. Another suggestion was made to use wording consistent with article 20 of the Model Law on Arbitration (see above, para. 37).

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions (paras. 24-27)

67. It was suggested that a clearer distinction could be made in the Notes between (a) administrative services for hearings, which could address the administrative arrangements for the proceedings such as those set out in paragraphs 24 and 25, and (b) secretarial support, which could address the potentially more fraught issue of arbitral tribunal secretaries, and the different tasks that person was expected to perform.

68. In relation to services provided by arbitral institutions as addressed in paragraph 24 of the Notes, it was observed that those services varied greatly depending on the institution, and that that matter should be highlighted in the Notes. It was suggested to indicate that a number of administrative services would usually be organized firstly by the parties or, depending on the circumstances, by the arbitral tribunal, and then possibly by arbitral institutions. It was further suggested to refer in the Notes to services rendered by professional hearing centres which had recently been established in different parts of the world.

69. A suggestion to address in the Notes issues that may arise when hearings take place at the premises of a counsel of a disputing party received some support, but it was also said that such a practice should not be a default or presumptive practice. It was suggested that language could be included in square brackets in that respect for the consideration of the Working Group at its next session.

70. A question was raised as to whether, in relation to a tribunal secretary, issues such as costs, disclosure of participation, and independence should be addressed in the Notes. In relation to costs, it was said that costs might depend on the arbitral institution and the fee structure of arbitrators themselves, with for example ad

valorem fee structures possibly giving rise to different remuneration structures for secretaries than hourly fee structures for arbitrators.

71. As regards disclosure of possible conflict of interest, views were expressed that secretaries should in no circumstance be involved in decision-making, and consequently, it was queried whether such disclosure was necessary. A view was expressed that in different arbitrations, and depending on the practice of the arbitral tribunal, a tribunal secretary might undertake substantial work nonetheless falling short of decision-making, and consequently disclosure of possible conflict of interest and indeed of the scope of a secretary's function was desirable.

72. Another view was expressed that as a secretary was under the supervision of an arbitral tribunal, and the arbitral tribunal was in effect ultimately responsible for its output, disclosure of a secretary was not necessary.

73. In relation to issues of independence, it was clarified that a number of institutional guidelines existed in that respect. It was suggested that there was no common practice in relation to whether a declaration of independence was required on the part of arbitral tribunal secretaries. A view was expressed that because in practice an arbitral tribunal would select its own secretary, thus in effect imposing that choice on the parties, a declaration of independence from that secretary would be desirable.

5. Deposits in respect of costs (paras. 28-30)

74. It was suggested that paragraph 28 of the Notes be clarified, and that it might better commence by replacing the first sentence with the words, "Unless and to the extent the matter is handled by the institution", and then proceed with drafting modifications as appropriate, with the second sentence. It was clarified that different institutions addressed deposits in respect of costs differently.

75. It was also suggested to flag the desirability of the arbitral tribunal identifying from the outset of proceedings how it intended to deal with fees and costs. It was said that the Notes should reflect matters in relation to fees and costs, including a provision on deposits in respect of costs, as set out in articles 40-43 of the UNCITRAL Arbitration Rules 2010 (see also above, para. 22).

76. It was highlighted that deposits for costs ought to address fees and expenses of arbitrators. It was queried whether a provision on deposits for costs in the Notes should address practicalities such as bank guarantees and the increasing number of issues that arise in relation to regulation governing the identification of beneficiaries and issues in relation to international sanctions. It was considered that it might be useful to refer to such issues in the Notes.

77. A question was raised as to whether the practice of third party funding should be referred to in the Notes. A diversity of practice in relation to third party funding was expressed and it was queried whether, if the Notes were unable to provide guidance as a result of the still-evolving nature of topic, it would nonetheless be useful to flag the existence of the practice and the possible procedural issues it might entail. After discussion, it was agreed that the Notes should not address the subject.

78. Other issues raised for possible inclusion in Note 5 included: (i) a reference to the services provided by some arbitral institutions to hold funds for parties; (ii) issues raised by value-added tax; and (iii) the matter of interest on deposits.

6. Confidentiality of information relating to the arbitration; possible agreement thereon (paras. 31 and 32)

Confidentiality in international commercial arbitration

79. It was queried whether the first sentence of paragraph 31, which provided that "confidentiality is one of the advantageous and helpful features of arbitration" still constituted a general principle in international commercial arbitration, or whether uncertainty had emerged in that respect in practice. Some views were shared in

relation to recent changes in national legislation which did not provide for confidentiality as a default principle in international commercial arbitration.

80. Other views were expressed that confidentiality was a key feature of international commercial arbitration and that the Notes should retain that principle as expressed in the first sentence of paragraph 31. It was suggested that in any event, the matter be treated with caution.

81. After discussion, it was agreed to retain the general content of the principle as contained in Note 6.

Confidentiality as it relates to investment arbitration

82. Views were expressed that investment arbitration ought to be raised as a separate issue in Note 6 in relation to confidentiality. In that respect, the Working Group recalled its recent works on transparency in treaty-based investor-State arbitration, including the revision to the UNCITRAL Arbitration Rules in 2013 in relation to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency").

83. After discussion, the Working Group recalled its earlier decision to highlight, throughout its consideration of the Notes, specific procedural issues arising in relation to certain types of arbitration, including investment arbitration, and to consider whether and how those issues should be addressed (see above, para. 21). Consequently the Working Group agreed to defer to a later stage of its deliberations a decision on whether Note 6 should specifically address investment arbitration, or refer specifically to the Rules on Transparency (see below, paras. 182-186).

Addition of "rules"

84. The Working Group agreed that a revised version of paragraph 31 of the Notes should indicate that there was no uniform approach to the duty to observe confidentiality in arbitration rules (in addition to national laws, as indicated in para. 31 of the Notes).

Limits of confidentiality

85. It was suggested that Note 6 should provide more information on the limits of confidentiality, and in particular whether any examples should be added to "information in the public domain" or "if required by law or a regulatory body", at the end of paragraph 32 of the Notes. A suggestion to add language "in pursuit of a right" was said to be too broad, and an alternative suggestion was made to add "in defence of a right". Another suggestion was made to reflect the language in article 34(5) of the UNCITRAL Arbitration Rules 2010; in response, it was said that that language referred to an arbitral award, rather than to proceedings as a whole.

86. It was said that — in the context of providing examples of the possible limitations of confidentiality — there may not be a sufficient difference between pursuit of, and defence of, a right. After discussion, it was agreed to include the words "to the extent necessary to protect a legal right" after the words "in whole" in paragraph 32 of the Notes.

Separate agreement on confidentiality

87. In relation to the last sentence of paragraph 31 of the Notes, a suggestion was made to highlight the possibility for the parties to sign a separate confidentiality agreement that would survive the arbitration and would be separately enforceable.

Confidentiality of information within the proceedings

88. A distinction was made between the confidentiality of proceedings, and confidentiality of material, such as commercial secrets or intellectual property rights, which might be required or requested to be disclosed within the proceedings (see above, para. 26), but for which disclosure was not desirable or prohibited by law. It

was suggested that the Notes should provide, in general language, the fact that the arbitral tribunal may make possible arrangements in respect of means of addressing or disseminating such confidential information (for example, to a limited number of designated persons) during the proceedings.

Confidentiality of information disclosed electronically

89. The Working Group agreed that the words in paragraph 32 "whether any special procedures (…) access)" should be deleted. The Working Group agreed to consider further that matter when addressing the content of Note 8 on "Telefax and other electronic means of sending documents" (see below, para. 101).

7. Routing of written communications among the parties and the arbitrators (paras. 33 and 34)

90. It was said in respect of the routing of written communications among the parties and arbitrators that practice had evolved, and that Note 7 could be significantly simplified. After discussion, it was agreed to (i) redraft the principle embodied in Note 7 to reflect simply that it was usual practice that communications took place directly between the arbitral tribunal and the parties, unless an institution was acting as an intermediary; and (ii) relocate the redrafted provision in Note 9 on "Arrangements for the exchange of written submissions".

8. Telefax and other electronic means of sending documents (paras. 35-37)

91. It was agreed that the terminology and practice as set out in Note 8 was outdated, and it was considered how the Notes might address technology and technological means of communication in a way that would retain relevance and neutrality into the future (see above, paras. 25 and 38 and below, paras. 110, 125 and 159). It was furthermore agreed that the heading of that Note would need to be revised.

92. A suggestion was made to avoid, to the extent possible, descriptive detail in mentioning types of technology or communication, and rather, to state more generally that the arbitral tribunal should consider discussing with the parties the transmission of documents and other materials at the outset of proceedings, as well as the addressees of such communications.

93. Views were expressed that the revised text of Note 8 ought to be sufficiently flexible to allow for the emergence of new technologies, and that it might likewise be appropriate to refer to current technologies in use in the context of international arbitration, such as e-mail and shared sites for document access. In support of a general approach, the need for flexibility in the Notes' consideration of means of communication was emphasized.

94. A suggestion was made to incorporate a definition of communication or data message, pursuant to definitions in other UNCITRAL texts such as the Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts. It was furthermore suggested that Note 8 should indicate the importance of the chosen means of communication to provide certainty as to the place and timing of exchange of information.

95. After discussion, it was agreed that a general description of the means of communication would be preferable in the Notes, such as a reference to "electronic communication" or "communication made by electronic means." It was also said that the heading of Note 8 could reflect those changes.

96. It was furthermore suggested that requiring the parties' agreement for the use of electronic means, as currently specified in paragraph 36 of the Notes, was overly prescriptive and not appropriate. A view was expressed that there ought to be a positive emphasis on arbitral tribunals' use of electronic means of communication, and indeed that the arbitral tribunal ought to be invited or encouraged to adopt such means.

97. The Working Group also considered several issues raised by the function of technology in arbitral proceedings, as follows. First, it was considered whether electronic communication was always a preferred option, or whether hard copies were in some instances preferable. It was queried whether linking the means of communication to a record of transmission, as provided for in the UNCITRAL Arbitration Rules 2010, was desirable. After discussion, it was agreed that of primary importance was the selection of a means of communication that would be certain to reach the other disputing party, and that the Notes could clearly reflect that and highlight that the chosen means of communication should provide for a record of transmission. Further, the Notes could specify that the chosen means of communication should also be considered acceptable by courts of the country where the award was to be enforced.

98. In a similar vein, it was queried whether issues arising when both soft and hard copy documents were used in the proceedings ought to be addressed in the Notes. After discussion, it was said that several modes of transmission might be addressed in the Notes, but that that was an area where the issue might be flagged without further detail being necessary.

99. Second, the Working Group considered issues raised by the use of technology that may require a license or other restrictions and hence might not be accessible to all parties. After discussion, it was agreed that the Notes could confirm that the method of communication to be used in proceedings should be addressed at the outset of the proceedings, and that the technology to be used should be accessible to all parties.

100. Third, it was agreed that a common repository for documents (examples given included a cloud or dropbox function, or shared site or platform set up for the arbitration), was a useful tool, although it was said that the frequency of the use of such tools varied in international arbitration. After discussion, it was agreed that the Notes should highlight the existence and usage of such tools, doing so in a neutral and non-directive way.

101. It was also suggested that Note 8 might address matters of data security (see above, para. 89).

102. By way of conclusion, it was agreed that Note 8 could highlight some of the important issues raised by communications and technology, with an emphasis on the functions fulfilled by the means of communication, and at the same time, retain a technologically-neutral language that would not be rendered obsolete as the Notes aged.

9. Arrangements for the exchange of written submissions (paras. 38-41)

103. It was queried whether the language at the beginning of paragraph 38 of the Notes, limiting the paragraph to documents submitted after the statements of claim and defence, was too restrictive. It was agreed that the scope of Note 9 ought to refer to all written submissions.

104. In relation to the list of terms to designate submissions provided by way of example in paragraph 38 of the Notes, it was queried whether the list was helpful and complete. A view was expressed that in light of the different terminological uses, even in the same language, in different jurisdictions, such a list might not be useful. Another view was expressed that to the contrary, the list by its nature implied the use of different terminology and consequently was helpful.

105. A suggestion was made that after each round of submissions, it may be useful for the arbitral tribunal to consult with the parties about the status of the arbitration and the possibility to meet with the parties to consider further timetabling and whether additional evidence needed to be adduced, and that paragraph 39 could better reflect that possibility, in lieu of the final two sentences of that paragraph. It was considered on what matters evidence was required to be adduced, and whether in particular it be limited to points that had been identified as contested points. It was furthermore said that it might be useful to have a list of points at issue that could be prepared by the

arbitral tribunal or jointly by the parties in order to narrow the contested points (see also Note 11, "Defining points at issue; order of deciding issues; defining relief or remedy sought").

106. The Working Group considered paragraph 39 of the Notes, which provided that while ensuring the proceedings were not unduly protracted, the arbitral tribunal might wish "(...) to reserve a degree of discretion and allow late submissions if appropriate (…)". In that respect, a proposal was made to add to that language that in such a case, the parties ought to be treated fairly. Another view was expressed that most arbitration rules already permitted tribunals a degree of discretion in extending deadlines, and that such a discretion need not be exercised prior to the expiry of the deadline — in other words, it could be construed as allowing a late submission of a document. It was said that wording could be inserted to reflect a tribunal's discretion to permit late submissions and its discretion to extend deadlines.

107. It was also suggested, in relation to paragraph 40 of the Notes, that that paragraph did not adequately reflect a common practice of exchanging written submissions not only before, but also after, a hearing. It was agreed that the language should be modified accordingly (see also para. 69 of document A/CN.9/WG.II/WP.183).

108. In relation to paragraph 41 of the Notes (on consecutive or simultaneous submissions), it was suggested that that section be redrafted with a view to simplifying it.

109. In response to a question whether Note 9 ought to address the likelihood of submission after the proceedings are closed, the Working Group agreed to consider at a later stage of its deliberations whether that matter would deserve to be addressed in a separate Note.

10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references) (para. 42)

110. It was queried whether the list of potential practical arrangements in paragraph 42 of the Notes was accurate or complete. A view was expressed that it lacked reference to technology-based document management and production, and that such an omission ought to be rectified (see also above, paras. 25, 38 and 91-102, and below paras. 125 and 159). Likewise, it was said that reference in the final bullet point of that paragraph to "paper documents" was out-dated; and also that a reference to issues arising from the use of hyperlinks in documents (or technology-neutral expressions of hyperlinks) could be included.

111. It was also said that many of the considerations set out in paragraph 73 of document A/CN.9/WG.II/WP.183 might be applicable, although it was emphasized that the list in the Notes should not express a preference for hard copy or soft copy documents, but rather should remain neutral, given that depending on the circumstances, either form could be desirable.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought (paras. 43-46)

112. A view was expressed that a list of points at issue should be prepared by the arbitral tribunal, based on the parties' submissions and presentations. It was said that an important element of a list of points at issue should be its evolutive nature, bearing in mind that if such a list were made at too early a stage in the process it might require a great deal of unnecessary revision than if its initial conception came later in proceedings.

113. It was also said that paragraph 43 of the Notes need not emphasize the disadvantage of a list of points at issue, since such a list, especially when prepared at an appropriate stage of proceedings, provided a very beneficial opportunity, inter alia, to receive feedback from the arbitral tribunal.

114. In relation to the order in which points at issue should be decided (paras. 44 and 45 of the Notes), a suggestion was made to highlight the flexibility of the arbitral tribunal in determining the sequence of proceedings.

115. In relation to paragraph 45 of the Notes, a question was raised as to whether the terms "partial", "interlocutory" or "interim" awards referred to decisions that were final with respect to the issues. It was said that the Working Group, when it had encountered the issue in relation to the UNCITRAL Arbitration Rules 2010, had determined that all awards were final and binding by their nature, and hence different terminologies could lead to confusion. It was said in response that in terms of a partial decision, it may have different consequences depending on the *lex arbitri*, and in particular that should be flagged in the Notes as a matter to be taken into account when considering bifurcation of proceedings (see also para. 78 of document A/CN.9/WG.II/WP.183). It was agreed that it would be useful to insert a new sentence in that paragraph, in order to flag two distinct consequences of a decision, first, whether it was final and binding on the parties and the arbitral tribunal, and second, whether it was open to appeal.

116. In relation to the matter of whether to define more precisely the relief or remedy sought (para. 46 of the Notes), it was said that in certain jurisdictions, the arbitrators would be expected to assist the parties in the manner (but not on the substance) in which they presented their case, so as to avoid that the case failed on reasons of form or similar reasons. Another view was expressed that the arbitral tribunal should not be perceived as giving advice to one party. It was said that in some instances, it would be acceptable for an arbitral tribunal to merely indicate to a party that its claim, or relief sought, was not sufficiently precise.

12. Possible settlement negotiations and their effect on scheduling proceedings (para. 47)

117. The Working Group considered paragraph 47 of the Notes, which provided that the arbitral tribunal could bring up the possibility of settlement. Although it was generally agreed that an arbitral tribunal could raise the possibility of settlement to the parties, diverging views were expressed as to whether an arbitral tribunal should be involved in those negotiations.

118. Consequently a suggestion was made that that Note could more clearly express that the arbitral tribunal could suggest the possibility to the parties that they attempt settlement negotiations outside the context of the arbitration, for example by engaging the services of a third party mediator.

119. In relation to the separate but related point of whether the Notes should raise the possibility of an arbitrator or arbitral tribunal engaging in or facilitating settlement negotiations between the parties, different views were expressed.

120. Some views were expressed that Note 12 should not call attention to the possibility that an arbitrator could become involved in the brokering of a settlement, as that was not a practice that was widely undertaken or accepted in all legal cultures, but rather that the Note should be limited to expressing in narrow terms that an arbitrator could suggest the possibility of settlement outside the context of the arbitration proceedings themselves.

121. Another view was expressed that a number of jurisdictions, and a number of international guidelines, suggested that where parties agreed — their agreement being critical in respect of both the principle and modalities of settlement discussions — and where applicable law permitted, facilitation of settlement by an arbitrator or arbitral tribunal exercising due caution and restraint, was deemed acceptable and even welcome. In that respect, it was also said that arbitrators should be given discretion to undertake the role of mediator should they be requested to do so by the parties.

122. It was suggested by a number of delegations that the second sentence of paragraph 47 of the Notes could be either deleted or worded in a more neutral manner.

123. A suggestion was made to delete paragraph 47, based on the diverging views expressed in relation to the role it suggested or implied regarding the arbitral tribunal's involvement in settlement, and on the fact that the discussions had little implication in any event to the scheduling of proceedings. A further suggestion was to retain the text without any amendment, as it was recalled that that Note did not raise any issue in practice, and had been considered at length when the Notes were initially prepared in 1996.

124. After discussion, the Working Group requested the Secretariat to redraft Note 12, including alternative language to take into account the issues raised in the discussions. It was stressed that the various views expressed in relation to Note 12 should not be interpreted as being accepted or endorsed by the Working Group given the exploratory nature of the discussion at this point (see above, para. 12).

13. Documentary evidence (paras. 48-54)

125. The Working Group agreed that information regarding electronic submission of documentary evidence would be appropriate for inclusion in Note 13 (see para. 83 of document A/CN.9/WP.183; see also above paras. 25, 38, 91-102 and 110, and below, para. 159).

(a) Time limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission (paras. 48 and 49)

126. It was observed that paragraphs 48 and 49 dealt with documentary evidence from the very narrow perspective of time limits for their submission, and it was suggested that additional aspects be addressed in that section. It was also suggested that paragraph 48 indicate that time limits for both document production and submission of evidence be discussed at the outset of the proceedings.

127. Further, it was said that paragraph 48 did not reflect the current practice of submitting evidence with written submissions, and it was suggested that the first sentence of that paragraph could be deleted or modified to reflect that practice.

128. In relation to the late submission of evidence addressed in paragraph 49 of the Notes, the Working Group agreed that the Notes ought to be less prescriptive about when late submissions could be accepted, as late evidence could in some instances be helpful to the arbitral tribunal but also might require that the other party be given an opportunity to comment or produce further evidence (see paras. 90-91 of document A/CN.9/WG.II/WP.183). The Working Group further agreed that seeking prior permission of the arbitral tribunal might be one means to allay concerns in relation to the submission of late evidence, and could be inserted in the Notes as an illustration. It was suggested that the Notes could further indicate that in requesting permission for a late submission, a party could provide information on the reasons for late production.

129. In response to a question whether the Notes should include provisions dealing with the consequences where the party concerned did not show sufficient cause for late submission, it was said that the Notes should not provide directions on how documents submitted late should be handled. The Working Group agreed that the possible costs consequences of late submissions could be mentioned in the Notes.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence (paras. 50 and 51)

130. The Working Group considered that the Notes ought to provide additional information regarding the nature of document production and different means by which not only the arbitral tribunal might request it, whether it did so *sua sponte* or at the request of one party, but also, more explanatory information regarding how the parties might seek production of documents from another party. It was queried whether the Notes should provide for the possibility of the arbitral tribunal suggesting to the parties, or addressing in a procedural order, the matter of document production, and the timing at which that issue should be raised. A view was expressed that an

arbitral tribunal should wait until it became apparent that the parties would request document production so as not to artificially provoke requests, and another view that for the arbitral tribunal to raise that issue required an element of judgment but typically should be raised as soon as possible. A suggestion was made that the Notes should mention that arbitral tribunals could provide at the outset of proceedings, where there was agreement between the parties to request production of documents, for a framework of document production, such as a Redfern schedule, rather than a procedural time frame per se.

131. It was suggested that paragraphs 51 and 52 could be revised taking into consideration the substance of the IBA Rules on the Taking of Evidence in International Arbitration.

132. Additional suggestions were made to include in Note 13 confidentiality issues that might specifically arise at the stage of providing documentary evidence; and the matter of preservation of evidence, or issues specific to production of evidence in an electronic format.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate (para. 52)

133. The Working Group discussed whether, in light of the increasing prevalence of electronic disclosure in international arbitration, any guidance should be added in relation to the provenance of documents disclosed only electronically, as well as any issues relating specifically to electronic disclosure — for example, guidance relating to meta-data and electronic tagging of documents.

134. The Working Group agreed to include translations within the list set out in paragraph 52 of the Notes.

(d) Are the parties willing to submit jointly a single set of documentary evidence (para. 53)

135. The Working Group agreed that paragraph 53 of the Notes should differentiate between the issue of authenticity of documents, and the organization of documentary evidence. It was suggested that that section should provide more information on how parties could present their documents, such as the use of hyperlink indexes. It was suggested that presentation of documents played an important role in assisting the arbitral tribunal to better understand the issues at stake in a dispute.

136. It was suggested that the Notes, whether in that section or in Note 19 addressing requirements in relation to awards, could indicate that the arbitral tribunal might be entitled to disregard evidence filed but not referred to in the pleadings.

14. Physical evidence other than documents (paras. 55-58)

137. A suggestion was made to revise the title of Note 14, so that it read “Other evidence”, and to relocate it after Note 16.

138. It was said that Note 14 could better distinguish between the illustrative role of site visits, and the evidentiary value of such visits and that that should be clarified by the arbitrators. Technologies permitting virtual representations of sites were said to be useful, and should be referred to in Note 14.

139. It was said that the sites to be inspected were often under the control of one party, and paragraph 58 could underline the possibility for the other party to visit the sites in advance of the inspection by the arbitral tribunal.

140. It was suggested that Note 14 should include provisions on the cost implications and the allocation of expenses in consideration with the submission of physical evidence, and in particular the costs that might result from on-site inspections, as compared to other practices, such as virtual representations of the sites, or videoconferencing.

15. Witnesses (paras. 59-68)

(b) Manner of taking oral evidence of witnesses (paras. 63-65)

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted (para. 63)

141. The Working Group agreed that common terminology (e.g., "direct examination"; "cross-examination"; "re-examination"; etc.) should be reflected in paragraph 63 of the Notes, as should the frequent practice of using witness statements in addition to hearing oral witness evidence.

142. In relation to paragraph 63, it was said that it should simply provide that the arbitral tribunal should discuss with parties how witnesses would be heard.

143. It was suggested that Note 15 should clarify that a written witness statement should refer to all documents relied upon, and should include both the practice of submitting those documents as attachments to the statement or as part of a single bundle for witness evidence and exhibits.

144. It was suggested that Note 15 should highlight the consequences of a witness' failure to attend a hearing to provide oral testimony, including inferences that could be drawn from unexcused absences or the arbitral tribunal's discretion to determine the weight to be accorded to that witness' written evidence or not to admit that evidence at all. It was also said that Note 15 could refrain from highlighting such consequences, but that if it included language on that matter, then Note 15 should also refer to the importance of advising the parties to that effect.

145. It was said that in some jurisdictions, common practice was that the arbitral tribunal should advise parties, in the interest of cost and time efficiency, whether a witness needed to appear at all. In response, it was said that different jurisdictions had different practices in that regard, and that in some jurisdictions, the view was that before hearing a witness it was difficult to judge the relevance of his or her testimony.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form oath or affirmation should be made (para. 64)

146. In relation to paragraph 64 of the Notes, which addressed oaths, it was said that the arbitrators might draw attention to the criminal consequences in some jurisdictions of lying under oath.

(c) The order in which the witnesses will be called (para. 66)

147. In relation to paragraph 66 of the Notes, the Working Group agreed that it would be useful to adopt the language suggested in paragraph 106 of document A/CN.9/WG.II/WP.183.

(d) Interviewing witnesses prior to their appearance at a hearing (para. 67)

148. It was said that language set out in paragraph 107 of document A/CN.9/WG.II/WP.183 provided a good basis for making clear that all parties should have the same information in relation to the possibility of contact between a party and a witness while a witness was giving evidence, but that it should be made clear from the beginning of paragraph 67 of the Notes that the arbitral tribunal should clarify at the outset of proceedings whether any contact would be appropriate prior to testimony being given; it was said that during testimony, it was common practice that no contact be had.

149. It was agreed to delete the phrase "In some legal systems" at the beginning of paragraph 67 of the Notes, which was said to draw inspiration from national jurisdictions in which pre-testimonial contact with witnesses was not permitted in either court practice or international arbitration. It was said that now, an increasing number of jurisdictions that have retained that rule for court practice were generally accepting pre-testimony contact between party and witness in international arbitration. It was suggested that these practices be better reflected in the Notes.

16. Experts and expert witnesses (paras. 69-73)

150. The Working Group observed that the question of participation of experts in arbitral proceedings had evolved. In line with the approach adopted by UNCITRAL when preparing the UNCITRAL Arbitration Rules 2010, it was suggested that more prominence be given to the question of party appointed experts. The Working Group agreed that section (b) of Note 16, "Expert opinion presented by a party (expert witness)", be addressed as a first item under that Note, followed by the section on "Expert appointed by the arbitral tribunal".

151. The Working Group further agreed that paragraph 69 of the Notes be redrafted as suggested in paragraph 108 of document A/CN.9/WG.II/WP.183, with the modification set out in paragraph 150 above, as well as a reflection that the presentation of expert witnesses was a right for the parties, so the word "permitted" should be replaced by a more appropriate wording; and that modifications should be made to reflect that the appointment of experts by the arbitral tribunal was a matter of efficiency rather than "power".

(a) Expert appointed by the arbitral tribunal (para. 70)

152. It was said that paragraph 70 of the Notes should be revised to reorder the sequence of events where the arbitral tribunal was to appoint an expert. It was said that first the principle of a tribunal's appointment of the expert should be discussed in consultation with the parties, and subsequently, the parties could be consulted in relation to the choice of the candidate itself.

(i) The expert's terms of reference (para. 71)

153. In response to a suggestion that paragraph 71 of the Notes should indicate that the arbitral tribunal could appoint an expert to report on issues determined by the arbitral tribunal, on the basis of proposal made to the parties, it was said that it should be for the arbitral tribunal to determine the issues that it wished its appointed expert to report on.

154. The Working Group agreed that paragraph 71 could include provisions on the desirability of clarification by the arbitral tribunal regarding who could communicate with the expert (see para. 114 of document A/CN.9/WG.II/WP.183).

(b) Expert opinion presented by a party (expert witness) (para. 73)

155. In relation to paragraph 73 of the Notes, the Working Group agreed that consideration should be given to the list of items contained in paragraph 116 of document A/CN.9/WG.II/WP.183.

156. It was suggested that Note 16 could include provisions on (i) single joint experts; and (ii) on the practice of the concurrent expert evidence chaired by the arbitral tribunal, sometimes known as "expert conferencing" or "hot-tubbing".

157. It was further agreed that Note 16 could refer to the possibility that an arbitral institution, a chamber of commerce or other similar bodies might be prepared to assist in the selection of experts.

158. It was suggested that, consistent with article 29(2) of the UNCITRAL Arbitration Rules 2010, Note 16 should include provision on the expert's qualifications, as well as its duties of impartiality and independence.

17. Hearings (paras. 74-85)

159. As a general matter it was said that reference be made to hearings that incorporated, or were held by virtue of, technical means — ranging from the use of visual aids for the presentation of documents, such as PowerPoint in hearings, to electronic bundles, to hearings held via videoconference (see also above, paras. 25, 38, 39, 91-102, 110 and 125).

160. Further, it was said that Note 17 could address the admissibility of evidence new to the arbitration at the hearing (see para. 119 of document A/CN.9/WG.II/WP.183). It was said that if a witness introduced through his or her testimony new documents and facts, that could create an undesirable situation.

(a) Decision whether to hold hearings (paras. 74 and 75)

161. In relation to paragraph 75 of the Notes, it was queried whether it could be clarified in respect of other factors militating for and against holding an oral hearing (see para. 120 of document A/CN.9/WG.II/WP.183). A view was expressed that both paragraphs 74 and 75 should be completely revised because their general tone was no longer in line with international practice. It was generally accepted that pursuant to common practice, including under the UNCITRAL Arbitration Rules 2010, where the parties requested a hearing, that request could not be rejected by the arbitral tribunal. It was said that discussion between the arbitral tribunal and the parties remained highly relevant, and consequently that the last sentence of paragraph 75 should be included more prominently in that paragraph. Another view was expressed that in some instances, it would be at the discretion of the arbitral tribunal as to whether to hold a hearing, for example in the event of proceedings where the respondent was not participating.

162. It was said that, in relation to paragraphs 75 and 76, the Notes could make a clearer distinction between evidentiary hearings and hearings on procedural matters.

(b) Whether one period of hearings should be held or separate periods of hearings (para. 76)

163. In relation to paragraph 76 of the Notes, a view was expressed that consecutive hearings were preferable to separate hearings, and moreover that continuous hearings were much more prevalent in practice, and therefore that paragraph could be modified. Another view was expressed that separate hearings could be unavoidable in accommodating parties' and arbitral tribunal's schedules, and that it would thus be useful to retain that paragraph.

(c) Setting dates for hearings (para. 77)

164. It was agreed to reformulate paragraph 77 of the Notes to reflect that setting "target dates" was not usual practice, but rather that dates for hearings were normally fixed, at the earliest opportunity for doing so, and that the length of the hearings or even the need for a hearing might be subject to later reconsideration.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses (paras. 78 and79)

165. In relation to whether there should be a limit on the aggregate amount of time each party should have for oral arguments and questioning witnesses (paras. 78 and 79 of the Notes), a view was expressed that parties should not be allocated the same amount of time, given that the number of witnesses a party planned to present might vary considerably with the number presented by another party. In response it was said that the statement in paragraph 78 providing for a general principle of giving equal time to each party, unless justification existed for differentiated treatment, provided the proper general rule and provision for exception.

(e) The order in which the parties will present their arguments and evidence (para. 80)

166. It was said in relation to paragraph 80 of the Notes that it ought to be flagged that there were different practices as to which party was permitted to present its evidence and arguments first or last, depending on the circumstances.

(g) Arrangements for a record of the hearings (paras. 82 and 83)

167. A suggestion was made to highlight in paragraphs 82 and 83 of the Notes that the arbitral tribunal could decide on the appropriate means of recording the hearings, in consultation with the parties.

168. It was said that references in those paragraphs to the arbitral tribunals' notes should be removed. Views were expressed that audio and video recordings and transcripts were very commonly used in practice, although it was acknowledged that in simple proceedings or for procedural hearings, a different or more cost-effective practice could be adopted.

169. Another suggestion was made to provide in that Note for the opportunity for both parties to review the transcripts, rather than, as currently expressed in paragraph 83 of the Notes, for only the person who made the statement to do so.

170. In relation to the suggestion contained in paragraph 131 of document A/CN.9/WG.II/WP.183 that the pros and cons of certain practical issues, such as the provision of interpretation and the remote attendance of witnesses be added, it was suggested that such provisions would be useful, and would be better located under Note 15 on "Witnesses".

171. After discussion, the Secretariat was requested to redraft section (g) of Note 17, bearing in mind the diversity of views that had been expressed.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments (paras. 84 and 85)

172. It was suggested that the Notes' indication that some legal counsel were accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and other parties no longer reflected current practice.

173. It was said, however, that there was a distinct need to address post-hearing briefs, and to highlight that it could be desirable for the arbitral tribunal to give indications to the parties regarding specific issues to be addressed that had been identified by the arbitral tribunal as relevant to their decision, as well as more logistical issues such as page length.

174. A proposal was made to include in the Notes a provision suggesting that at the end of a hearing or of proceedings, the arbitral tribunal should give direction as to the claims for costs to be made by the parties. It was further suggested that the Notes should reflect that the arbitral tribunal should set aside time for its deliberations after the closing of the hearings, and before the closing of the proceedings.

18. Multiparty arbitration (paras. 86-88)

175. It was observed that Note 18 could present the matter of multi-party arbitration with a different tenor, as it was said that in practice, problems only tended to arise in such arbitrations where a plurality of parties had different interests or sought different relief. It was said that guidance could be provided in the Notes in that respect.

176. A suggestion was made to address issues of joinder and consolidation either under Note 18 or elsewhere in the Notes (see para. 135 of document A/CN.9/WG.II/WP.183, and the comments of the Arbitration Institute of the Stockholm Chamber of Commerce in document A/CN.9/WG.II/WP.184).

19. Possible requirements concerning filing or delivering the award (paras. 89 and 90)

177. A question was raised whether Note 19 should be deleted, as it addressed issues that would arise after the award was rendered, and therefore was outside the scope of the Notes. In response, it was said that Note 19 was useful in reminding parties and arbitrators of the formalities required in certain jurisdictions regarding the filing of awards, and the potential legal consequences attached to non-compliance. It was

suggested however that paragraph 89 of the Notes should most probably not refer to the notion of "invalidity of the award".

178. It was said that Note 19 ought to highlight requirements not only for filing and delivering the award, but also in respect of the content of or formalities in respect of an award. It was said that the law that should be considered in that respect was both the relevant applicable law at the place of the award, as well as the law at the place where the award was sought to be enforced. It was suggested that arbitration rules might also stipulate requirements for an award and thus should also be mentioned.

179. It was suggested that the title of Note 19 could be amended to reflect that broader understanding of what the Note might address.

180. Furthermore, it was suggested that Note 19 could provide some guidance as to which party should take the initiative in filing and delivering the award.

181. A suggestion was made that a provision could be added whereby the Notes could remind arbitral tribunal that it should, at the outset of the proceedings, identify the relevant governing laws, including the lex arbitri but also the law governing the arbitration agreement as well as the law governing the merits of the disputes. It was also said that the Notes should not contain any provision on the content or drafting of the arbitral award.

20. Specific types of arbitration; investment arbitration

182. The Working Group considered, at the close of its session, how to address the matter of investment arbitration in the Notes (see above, paras. 18-21, 82 and 83).

183. One approach suggested was to indicate in the introduction to the Notes that the guidance set out in the Notes applied exclusively to international commercial arbitration, and not to investment arbitration. It was said in response that the practices and guidance outlined in the Notes applied equally to investment arbitration and to limit the Notes' application to commercial arbitration would be an overly narrow description. It was also stressed that the Notes had, and it was desirable that they continue to have, a general application, such that they could be used as a guidance document in a range of different types of arbitration.

184. A further suggestion was made to include in the "Introduction" to the Notes a provision calling attention of the readers to the various types of arbitrations that exist in practice, including a specific reference to investment arbitration.

185. It was further suggested to address in Note 6, either in the text itself, in a footnote or in a separate Note, that different rules, treaties or law might govern the matter of transparency as it related to investment arbitration. It was said that such an approach would preserve the general nature of the Notes, but would highlight that a specific issue might arise in relation to investment disputes.

186. It was said in relation to whether guidance ought to be provided in the Notes on the practice of investment treaty arbitration pursuant to the UNCITRAL Rules on Transparency, that no practice had yet developed in respect of those Rules and consequently to give guidance on the conduct of arbitration pursuant to those Rules would be premature.

B. Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

(A/CN.9/WG.II/WP.183)

[Original: English]

Contents

I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993, [1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.[3]

2. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the Notes could be considered as a topic of future work. [4] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[5] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010. [6] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the draft convention. [7] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if

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[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 291-296. For discussions at the session of the Commission, in 1994, of a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings", see Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 111-195; for discussions at the session of the Commission, in 1995, of a draft entitled "Draft Notes on Organizing Arbitral Proceedings", see Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 314-373. The Working Group may also wish to consult the drafts considered, namely documents A/CN.9/378/Add.2, A/CN.9/396, A/CN.9/396/Add.1, A/CN.9/410 and A/CN.9/423.

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II.

[3] Ibid., para. 13.

[4] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.

[5] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[6] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

[7] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

necessary, its sixty-second session, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.

3. A conference was held in Vienna on 21-22 March 2013 in cooperation with the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber on the topic, inter alia, of the Notes and matters that could be considered in their revision. In addition, a questionnaire on whether and how the Notes should be revised was made available to practitioners, through various distribution channels, including on the website of UNCITRAL. Suggestions made by practitioners are reflected in this note. In addition, submissions communicated to the Secretariat on the revision of the Notes are contained in document A/CN.9/WG.II/WP.184.

4. Moreover, the Working Group may wish to have regard in its consideration of the Notes to guidelines and protocols published by various arbitral associations and institutions[8] and, bearing in mind the intended universal applicability of the Notes,[9] may wish to consider how best experience in different jurisdictions can be brought to bear on the multi-faceted approach taken by the Notes.

II. Proposals for revising the UNCITRAL Notes on Organizing Arbitral Proceedings

A. General remarks and possible additional topics

General Remark

5. The Working Group may wish to provide guidance on the structure and form of, and substantive amendments to the content of, the revised Notes, it being understood that the drafting adjustments will be prepared by the Secretariat (see para. 2 above).

Structure and form of the Notes

6. The Working Group may wish to consider whether the structure and form of the Notes, their style and overall content still fit the needs of practitioners, or whether a different model should be developed. In particular, it may be useful to consider whether the Notes should remain purely descriptive and non-directive as they are currently.

7. Moreover, some of the practices the Notes describe have become common, while others are now virtually unheard of. Likewise, the Notes frequently suggest that the arbitral tribunal "may" wish to consider a matter, when in fact an arbitral tribunal should consider that matter in almost every case. While avoiding that the Notes become a best practice guide, the Working Group may wish to consider whether to nevertheless highlight practices that are often used.

Possible additional topics

8. The following topics were identified by users of the Notes as areas in which the Notes currently lack any, or sufficient, guidance, and which ought to be addressed therein.

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[8] See e.g., CIArb, Practice Guidelines and Protocols, available at: www.ciarb.org/resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/; and the IBA Rules on the Taking of Evidence in International Arbitration (2010), available at: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx; the ICC Revised Note on the Appointment, Duties and Remuneration of Administrative Secretaries, available at: www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Flash-news/Introduction-of-revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries/; The ICC Report on Issues to be Considered when Using IT in International Arbitration.

[9] See paragraph 11, Introduction to the Notes.

(a) Investment arbitration

9. The omission of information on issues specific to investment arbitration in the Notes has been highlighted by some users of the Notes as requiring redress. Should the Working Group determine that it would be desirable to include information in respect of investment arbitration proceedings, it will be necessary to determine whether such information would be best addressed as a discrete Note or included in existing Notes where relevant. Experts have considered that specific guidance might be needed on matters such as deadline for a State to respond, exercise of its discretion by the arbitral tribunal, interim measures, and assessment of evidence.

(b) Costs

10. It has been suggested that costs could be addressed in much more detail in the Notes, including in relation to guidance in determining the fees of the arbitrators, and the allocation of costs at the end of a hearing.

(c) Interim measures

11. It may be considered whether the Notes should provide guidance on interim measures ordered by arbitral tribunals in light of the relevant work previously done by UNCITRAL in that respect (see below, para. 79).

(d) Technology

12. Users of the Notes have suggested that including a separate section on the use of technology in arbitral proceedings, including for example guidance as to using technology during hearings, hearings conducted via video link and/or other means of data transmission, electronic disclosure and commonly accessible electronic sites for providing information electronically; as well as guidance on ancillary topics such as information security and data protection, might be warranted. Further it was suggested to include cautionary guidance or even a checklist in relation to the steps to undertake before engaging in a technology-heavy hearing for the first time. Terminology or guidance in that respect should be sufficiently general so as not to become quickly obsolete (see also below, paras. 25, 61, 64, 97 and 118).

Topics on which more guidance would be useful

Arbitral institutions

13. The role of arbitral institutions is mentioned frequently throughout the Notes. The Working Group may wish to consider re-visiting the references to institutions throughout the Notes, particularly when their role is described as “often” or “usually” undertaking certain roles (see for instance paras. 19, 24, 25 of the Notes).

Multi-party arbitration

14. Note 18 has been considered by users of the Notes insufficiently detailed to be of assistance in relation to providing guidance on multi-party arbitration (see below, paras. 134 and 135).

B. Comments on the Notes

Preface

15. The Working Group may wish to note that a revised text for the preface will be proposed by the Secretariat.

Introduction to the Notes (*paras. 1-13*)

General

16. Given the objective of the Notes, namely to provide non-binding guidance to arbitration practitioners generally (and in particular to parties less familiar with

arbitration), the Working Group may wish to consider whether to simplify the Introduction and in particular to clarify some of the paragraphs/paragraph headings.

17. The Working Group may wish to set out key procedural issues that the parties and/or arbitral tribunals should consider and prioritize at the outset of arbitral proceedings.

18. Certain substantive issues briefly addressed in the Introduction to the Notes, such as multi-party arbitration (also addressed in the body of the Notes), and information regarding the process of making decisions in arbitral proceedings, might be better addressed solely, and on occasion more comprehensively, within the body of the Notes. For example, the section on the "process", currently expressed in paragraphs 7 to 9 of the Introduction, may also have utility in the body of the Notes, following existing Note 1, and could be more comprehensive, for example by mentioning one common practice of preparing a written procedural calendar following the pre-hearing conference. The section on "Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings" expressed in paragraphs 4 and 5 would have utility in the body of the Notes.

19. In addition, general information regarding, for example, the desirability of consultations between the arbitral tribunal and the parties in relation to procedural matters, could be referred to, even where the arbitration rules do not necessarily require such consultation.

Paragraphs 1 and 11

20. The Working Group may wish to consider merging paragraphs 1 and 11 as paragraph 1 addresses the purpose of the Notes, and paragraph 11 observes that the purpose of the Notes is not to promote any practice as best practice. The Working Group may wish to confirm this understanding regarding the purpose of the Notes.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings (paras. 4-5)

21. Paragraph 4 of the Notes addresses the broad discretion and flexibility that laws and rules governing the arbitral procedure normally confer upon the arbitral tribunal (see, for instance, article 19 of the UNCITRAL Model Law on International Commercial Arbitration). In addition, most arbitration laws and rules promote fairness, equality, and efficiency as core principles to be adhered to in the conduct of arbitrations. The Working Group may wish to consider whether to emphasize that the arbitral tribunal's discretion should be exercised in accordance with these principles, as well as the other factors listed in paragraph 4 of the Notes.

22. As an illustration of drafting matters, the Secretariat will consider:

- Updating footnote 1 in order to refer in addition to article 17(1) of the UNCITRAL Arbitration Rules (as revised in 2010); and adding references to other well-known sets of arbitration rules which contain a similar principle to underscore the universal character of the Notes;
- Replacing the word "just" appearing in the last sentence of paragraph 4 before the words "and cost-efficient" by the word "fair" to promote consistency with the terminology used for example in article 17(1) of the UNCITRAL Arbitration Rules (as revised in 2010);
- Replacing the statement in paragraph 5 of the Notes that observes that "participants may be accustomed to differing styles of conducting arbitrations" with the phrase "participants may be accustomed to different styles of dispute resolution", since users of the Notes may be familiar with a range of methods of dispute resolution;
- Replacing the opening words "Such discretion may make it …" by the words "Such discretion often makes it …", in order to indicate that communication between the arbitral tribunal and the parties on the organization of the proceedings is common practice.

Process of making decisions on organizing arbitral proceedings (paras. 7-9)

23. The Working Group may wish to consider whether paragraph 7 should be revised to indicate that, while there may be cases where an arbitral tribunal may decide to organize the proceedings without consulting the parties, the common practice is for the arbitral tribunal to seek comments from the parties and involve them in the process. Further, while emphasizing that procedural decisions remain at the discretion of the arbitral tribunal, paragraph 7 could also reflect the suggestion that parties may propose procedural steps which they consider the arbitral tribunal should endorse. More generally, the Working Group may wish to consider whether to include provisions aimed at encouraging consultation with, or agreement of, the parties prior to decisions of the arbitral tribunal on procedural issues.

24. The Working Group may wish to consider whether to remove the reference to "improving the procedural atmosphere" at the end of paragraph 7 as its meaning may be unclear.

25. As part of general amendments to emphasize the prevalence of electronic means of communication and to update outdated language or practice in the Notes (see also above, para. 12 and below, paras. 61, 64, 97 and 118), the reference to "telefax" in paragraph 8 should be removed and replaced with a reference to electronic means of communication.

26. As it may be common practice that any meeting to organize the proceedings would take place before a hearing on the merits, the first sentence of paragraph 9 could be revised to read: "It is not uncommon for a special meeting to be devoted exclusively to such procedural consultations."

27. Further, a section on the process of making decisions in relation to organizing arbitral proceedings may address the issue of whether or not the presiding arbitrator can be entrusted with the power to perform certain tasks on his or her own. For example, the presiding arbitrator could decide alone on routine procedural matters (i.e. to extend the time limits for the parties to file their briefs, if so requested by any of the parties, and to postpone the date of any hearing ex officio) or in case of urgency, if he/she cannot reach the co-arbitrators for consultation.

List of matters for possible consideration in organizing arbitral proceedings (paras. 10-13)

28. The heading ("List of matters for possible consideration in organizing arbitral proceedings") of paragraphs 10-13 of the Notes, which set out broad matters for consideration in the context of organizing arbitral proceedings, is the same as the heading of the Table of Contents of the Notes. It is suggested that one of the two headings be amended for the sake of clarity.

29. The Working Group may wish to consider whether to clarify the meaning of the term "universal use" in paragraph 11, in particular whether that term is intended to refer to commercial and investment arbitrations or to refer to domestic and international arbitration.

Table of contents — List of matters for possible consideration in organizing arbitral proceedings

30. The Table of Contents, entitled a "list of matters for possible consideration in organizing arbitral proceedings" has been identified by users as a useful point of reference. The Working Group may wish to note that the list will have to be made consistent with any revision to the Notes.

Annotations

Note 1. Set of arbitration rules (paras. 14-16)

31. Note 1 could be complemented by further information regarding (i) the possibility of institutional support in the event parties select the UNCITRAL Arbitration Rules (as detailed in the 2012 Recommendations to assist arbitral

institutions and other interested bodies with regards to arbitrations under the UNCITRAL Arbitration Rules (as revised in 2010)), [10] and the possibility of conducting an arbitration with the UNCITRAL Arbitration Rules ad hoc, as well as (ii) the selection of other institutional rules and the considerations relevant to selecting an arbitral institution to administer an arbitration in that context. In relation to point (i), it may be considered whether to also explain why the parties may consider adopting a set of arbitration rules (for instance, certainty, support of the arbitral institution, management of the arbitrators' fees and expenses).

32. In relation to the caution advised in the event of "consideration of" a set of arbitration rules in paragraph 15 of the Notes, it could be considered whether the intended meaning is "agreement in relation to a set of arbitration rules where none were previously agreed"; furthermore, it might be considered whether the advantages of using a set of ad hoc or institutional rules should also be highlighted in the interest of providing a balance (see also, in this regard, the *travaux préparatoires* of the 1996 Notes, A/CN.9/378/Add.2, para. 7; A/CN.9/396/Add.1, pp. 10-11).

33. A question for consideration would be whether the arbitrators should accept a choice of arbitration rules by parties after the dispute has arisen and the arbitrators have been appointed. The members of the arbitral tribunal have accepted their mandate on the basis of the relevant arbitration agreement, and the use of arbitration rules not included in the arbitration agreement can have a substantial impact also on the procedure, for instance as to the time for rendering an award or the application of rules for fees in the arbitration rules.

34. The Working Group may also wish to consider whether paragraph 16 provides sufficient information in relation to the limits of the *lex arbitri* on the arbitrators' ability to conduct proceedings in the absence of agreement on arbitration rules.

Note 2. Language of proceedings (paras. 17-20)

35. It may be considered whether the advisability of consulting the parties before the arbitral tribunal takes such or any other procedural decision should be mentioned.

(a) Possible need for translation of documents, in full or in part (para. 18)

36. It may be considered whether the words "or languages" should be added after the word "language" in paragraph 18 in order to keep open the possibility for proceedings to be in more than only one language, and for the sake of consistency with paragraph 17.

37. The Working Group may wish to consider whether the Notes should point out that in some arbitrations it may not be necessary or cost efficient to have all documents translated. Indeed parties may wish to consider at the outset of proceedings, that certain categories of documents need not be translated or whether excerpts may be sufficient.

38. It may also be considered whether to provide in the Notes, as a practical matter, for the possibility of translated documents to be submitted a brief period after the submission of original language documents.

39. The quality and the accuracy of translations is plainly important, and the Notes may wish to provide guidance as to when certification of translations might be appropriate as well as guidance as to the resolution of disputes in relation to the authenticity of translations.

(b) Possible need for interpretation of oral presentations (para. 19)

40. Paragraph 19 queries whether arrangements for interpretation should be the responsibility of a party or the arbitral tribunal. Users have indicated that in the majority of cases, the responsibility for arranging for interpretation during oral hearings should lie with the parties and not the arbitral tribunal. Likewise it may be

[10] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), Annex I.

notable that in administered arbitrations, the parties rather than the institution typically arrange for translation or interpretation services.

(c) Cost of translation and interpretation (para. 20)

41. For the sake of clarity, it may be considered to revise paragraph 20 of the Notes as follows: "In taking decisions about translations or interpretation, it is advisable to decide whether any or all of the costs are to be covered, as an initial matter, directly by a party or out of the deposits. Whenever these costs are covered initially, the arbitral tribunal often has the power to decide thereafter how these costs, along with the other arbitration costs, will ultimately be apportioned between the parties."

Note 3. Place of arbitration (paras. 21-23)

(a) Determination of the place of arbitration, if not already agreed upon by the parties (paras. 21-22)

42. The last sentence of paragraph 21 indicates that the arbitral tribunal "may" wish to consult the parties before taking a decision on the place of arbitration. It may be appropriate to revise this sentence to indicate that such consultations are in fact now customary.

43. No distinction is currently made in Note 3 as between the seat of an arbitration, which is likely to be determined by reference to legal factors such as those set out in points (a) and (b) of paragraph 22 of the Notes, and potentially by other factors such as neutrality; and the physical location or place of hearings, which is likely to be determined by non-legal or factual factors, such as those set out in points (c) to (e) of paragraph 22. A number of users have suggested making this distinction explicit, and moreover to clarify the relevance of the legal place as opposed to the physical location of an arbitration.

44. An additional factor that may be relevant to a determination of the seat of arbitration (as distinct from the place of arbitration), possibly under subparagraph (a), is the relevant jurisprudence of that seat in relation to arbitral procedure, setting aside procedure and/or enforcement and recognition of arbitral awards or arbitration agreements.

45. Furthermore it may be helpful if the Notes were to explain that the weight accorded to the respective factors in determining seat and place of arbitration will differ depending on the arbitration.

(b) Possibility of meetings outside the place of arbitration (para. 23)

46. The final sentence of paragraph 23 refers to "The purpose of this discretion"; the Working Group may wish to consider whether the discretion to meet outside the place of arbitration might be for reasons other than purely economical ones, and if so, whether the opening words "The purpose" might be replaced with the words along the lines of "A key purpose".

Note 4. Administrative services that may be needed for the arbitral tribunal to carry out its functions (paras. 24-27)

47. As a matter of drafting, it may be useful to divide this Note into a section on (a) Administrative services for hearings, which could address the administrative arrangements for the proceedings such as those set out in paragraphs 24 and 25 (see also the list under para. 23 of the 2012 Recommendation to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010)), and (b) secretarial support, which could address the potentially more fraught issue of arbitral tribunal secretaries, and the different tasks that person is expected to perform.

48. In relation to the latter point, it may be considered whether to address specifically the disclosure of a secretary's involvement, as well as the question of the remuneration of secretaries and the bearer of a secretary's cost (arbitrator or party).

The Working Group may also wish to consider including guidance in relation to the independence of secretaries; users of the Notes have suggested that it is increasingly common for statements of independence to be furnished by prospective secretaries.

49. The Notes (in para. 27) currently address the differences of views or expectations as regards the nature of the tasks a secretary ought to be entrusted to carry out, and possible limits of their involvement, but the Working Group may wish to consider this guidance further.

50. Paragraph 25 currently addresses the possibility for parties to take responsibility of the administrative arrangements. It may be useful for the Notes to suggest that parties should decide at an early stage of the proceedings which party should be responsible for which arrangements.

Note 5. Deposits in respect of costs (paras. 28-30)

(a) Amount to be deposited (para. 28)

51. In the second sentence of paragraph 28, the words "In other cases" might be replaced by the words "In other cases, including ad hoc arbitrations …".

52. It may be considered whether arbitrators' fees and the administrative costs and/or registration fees charged by an institution (in the case of an institutional arbitration), should be included in the list of items falling into the estimate of costs of proceedings set out in paragraph 28. The Working Group may wish to refer to articles 40-43 of the UNCITRAL Arbitration Rules (as revised in 2010) when considering this subject. Furthermore, the Working Group may wish to consider whether the inclusion of tax liabilities should be addressed in relation to guidance on costs.

53. It may also be considered whether to include guidance where arbitration rules do not specify if all parties or simply the claimant is to make the deposit, and also whether to address the consequences when the deposit is not made in full by one or more parties; further, it may be considered whether it is standard practice (by institutions and/or arbitral tribunals) that the non-defaulting party make up any shortfall in the advance deposit.

54. Similarly, it may be useful to address the question of how to split costs if additional claims and/or counterclaims are raised, and likewise, the possible consequences if a party does not pay its share.

(b) Management of deposits (para. 29)

55. It may be worth considering whether, particularly as regards to deposits made in arbitrations where no institution is providing support, issues as regards the holding of money (e.g. the importance in some jurisdictions of having a client money account) ought to be addressed.

56. The Working Group may wish to consider including further information in relation to the description of the account set out in paragraph 29 of the Notes; for example, the specification of the holder of the account in addition to the type and location of the account. Issues such as whether interest will accrue on the account, and how any outstanding interest or monies will be returned at the end of proceedings, may also warrant consideration.

(c) Supplementary deposits (para. 30)

57. The Working Group may wish to consider including in the parenthetical in paragraph 30 of the Notes exigencies such as the proceedings extending beyond their estimated duration, for example because of their unanticipated increased complexity, or the joinder of additional parties to the dispute. As a matter of drafting, the parenthetical could be moved to precede the comma in that sentence.

Note 6. Confidentiality of information relating to the arbitration; possible agreement thereon (paras. 31-32)

58. Paragraph 31 (and in particular the first sentence thereof) could be amended to reflect better the intention of that paragraph to refer to commercial arbitration, as opposed to investment arbitration. Indeed, it may be that a separate provision on that matter in the context of investment arbitration is warranted in this section of the Notes, particularly in view of the coming into force of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration on 1 April 2014.[11]

59. The Working Group may wish to emphasize the need to address issues of confidentiality at an early stage of proceedings.

60. The Working Group may also wish to consider referring to the fact that various institutional rules or national arbitration laws include specific provisions on confidentiality.

Note 7. Routing of written communications among the parties and the arbitrators (paras. 33-34)

61. As with various other Notes, Note 7 may also be updated in relation to technological advances; for example, whether routing via a single e-mail copied to all party(ies) and the arbitrator(s) is a desirable means to serve documents simultaneously (see also above, paras. 12 and 25 and below, paras. 64, 97 and 118).

62. In addition to the practicalities of how written communications should be routed, it may be useful to note that the arbitral tribunal may wish to give guidance on whether unilateral communications between one party and the arbitral tribunal are permissible or whether, in all cases, communications to the arbitral tribunal should be shared with other disputing parties. Paragraph 34 could be revised to reflect that the usual practice now is for parties to correspond directly with the arbitral tribunal (with copy to all parties) and that the other arrangements mentioned are less common.

Note 8. Telefax and other electronic means of sending documents (paras. 35-37)

63. The Working Group may wish to consider amending the title of Note 8 to "Means of Communication".

64. It could be considered how to amend Note 8 to include technologically-neutral language that both reflects current technological practice whilst accommodating future changes in technology that might render certain terms obsolete. For example, the Working Group may wish to refer to "means of communication that provides or allows for a record of its transmission" (consistent with the UNCITRAL Arbitration Rules as revised in 2010) without seeking to list different means of communication. Note 8 should be updated to reflect current practice in relation to the exchange of submission of soft copy documents in addition to or in lieu of hard copy documents (see also above, paras. 12, 25 and 61 and below, paras. 97 and 118).

Note 9. Arrangements for the exchange of written submissions (paras. 38-41)

65. In paragraph 38, it may be useful to include language such as "or to prepare for meetings and discussions which might precede evidentiary hearings" at the end of the first sentence; and to add a sentence at the end of the paragraph to set out the practice in some complex proceedings of requiring the parties to file skeleton arguments that identify issues of law and fact and briefly state the parties' respective positions. More generally, the Working Group may wish to consider whether to revise paragraph 38 of the Notes to reflect that written submissions have now evolved as the principal method by which parties usually present their case. Indeed, it is not uncommon for arbitral tribunals to require parties to submit in writing all of their factual and legal arguments, as well as the evidence (e.g., documents, witness statements, expert reports) and legal authorities on which they rely.

[11] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex I.

(a) Scheduling of written submissions (paras. 39-40)

66. It may be desirable for the Notes to clarify in paragraph 39 that where the arbitral tribunal "might prefer not to plan the written submissions in advance", it may nonetheless want to schedule a procedural hearing at stated intervals in order to create foreseeable deadlines and/or for the arbitral tribunal to set, or the parties to agree, to a procedural schedule at the outset. Paragraph 39 also sets out that an arbitral tribunal may wish to permit itself discretion to allow late submissions if appropriate under the circumstances; the Notes may wish to provide for the arbitrators to clarify whether the time limits to be set are final, or whether they could be extended, and if extension is permitted, how requests therefor will be managed.

67. Likewise it could be indicated that the arbitral tribunal has the discretion to require or request supplementary or further submissions, where the relevant rules are silent on that matter.

68. In paragraph 40, concerning post-hearing submissions, the arbitral tribunal may be advised to clarify before, during or immediately after the close of oral arguments whether it will accept further written submissions, and any criteria that those submissions must satisfy (e.g. limited to certain topics, or limited by length).

69. Some users have indicated that the final sentence of paragraph 40 is not in line with current practice; the Working Group may wish to consider that matter.

70. As a matter of drafting, in paragraph 40, the words "are still acceptable" could be replaced by the words "may still be accepted".

(b) Consecutive or simultaneous submissions (para. 41)

71. The Working Group may wish to consider replacing the first sentence of paragraph 41 with a suggestion that written submissions on an issue may be made consecutively or otherwise as ordered by the arbitral tribunal, and to remove references to a party being given a period of time to "react" with a counter-submission.

72. As a matter of drafting, the phrase "within the same time period" in paragraph 41 could be replaced with "at the same time" or "simultaneously".

Note 10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references) (para. 42)

73. The Working Group may wish to consider whether other details ought to be added to the list set out in paragraph 42 of the Notes, including issues such as (i) possible agreement to produce joint or key sets of documents (see paragraph 53 of the Notes, to which a cross-reference could be made); (ii) whether to submit electronic copies of documents in the first instance, and hard copies a brief period thereafter; (iii) whether all documents accompanying the submission (e.g., bulky legal authorities, data spreadsheets, etc.) must be provided in paper form or may be provided in electronic form only; (iv) the desired format of certain electronic documents (for example, whether PDF documents should be text searchable or data spreadsheets should be provided in original format), bearing in mind the need to ensure technological advancements do not render the terminology obsolete; and (v) whether to characterise documents in ways additional to those set out in paragraph 42, for example differentiating between factual exhibits and legal authorities.

74. It may be useful for the Notes to set out in general terms the timing of the decisions to be made in respect of format, for example the utility of making such determinations in advance of the submission of statements of case.

Note 11. Defining points at issue; order of deciding issues; defining relief or remedy sought (paras. 43-46)

(a) Should a list of points at issue be prepared (para. 43)

75. The Notes currently observe that either the parties or the arbitral tribunal may prepare a list of issues. It may be useful to consider highlighting the differences between a party-agreed list and a tribunal-drafted list of issues. Furthermore it might be suggested that the arbitral tribunal may wish to conduct an initial preparatory meeting with the parties at the outset of the proceedings in order to determine key issues which need to be considered. The Working Group may wish also to clarify that "points at issue" can be factual or legal in nature.

76. It may also be considered whether the Notes ought to address explicitly, in addition to a list of points at issue, whether a party-agreed list of undisputed issues should be addressed in the Notes. Such a list might have the benefit of saving time and cost insofar as it ensures that parties need not adduce evidence relating to certain facts or matters of law.

77. As matters of drafting, the second sentence of paragraph 43 may read better if the words "it chooses" were to be replaced by "it shall determine". Likewise the words "preparing such a list" — which imply that the arbitral tribunal, rather than the arbitral tribunal or the parties, will prepare the list — might be replaced by "the preparation of such a list." Further, it may be considered whether the word "unnecessary" should be removed from the penultimate sentence in paragraph 43, as that word implies a judgement that may not be appropriate in this type of document.

(b) In which order should the points at issue be decided (paras. 44-45)

78. The Working Group may wish to consider whether a reference to bifurcating proceedings when one decision (e.g. on jurisdiction) is preliminary to another (e.g. on merits), should be included in subparagraph (b).

79. The Working Group may wish to consider addressing the matter of interim measures in paragraph 45 of the Notes, or thereafter (see above, para. 11).

(c) Is there a need to define more precisely the relief or remedy sought (para. 46)

80. The Working Group could consider whether paragraph 46 of the Notes could be re-drafted such that emphasis is placed on the need for the arbitral tribunal to act impartially and not in a way that could be perceived as giving advice to one party.

81. The Working Group may also wish to consider whether the need for separate awards might be addressed in this section.

Note 12. Possible settlement negotiations and their effect on scheduling proceedings (para. 47)

82. It may be considered whether a different approach should be promoted in Note 12 as international commercial arbitral practice has evolved in relation to the appropriateness of an arbitral tribunal recommending settlement.

Note 13. Documentary evidence (paras. 48-54)

83. It may be considered whether information regarding electronic submission of documentary evidence would be appropriate for inclusion in this section; for example, the possibility of submitting disclosure via a shared drive/party- and tribunal-accessible website or sharepoint; and the desirability and/or disadvantages of so doing.

84. It may also be considered whether the Notes ought to provide additional information regarding the nature of document production and different means by which not only the arbitral tribunal might request it (para. (b)), but also, more explanatory information regarding how the parties might seek production of documents from another party. For example, the Notes might be amended to include

the practice of producing a collaborative form of document request to which the claimant(s), respondent(s) and arbitral tribunal contribute (for example, a Redfern Schedule; see also the *travaux préparatoires* of the 1996 Notes, A/CN.9/396/Add.1, pp.16-17).

85. The Notes might also describe possible limits on party document requests, i.e. that they not be unreasonably burdensome (as provided for in the IBA Rules on the Taking of Evidence in International Arbitration). Users have indicated in particular that arbitral tribunals ought to be careful to define clearly the page limits for documents submitted electronically, foreseeing for example that embedded documents or hyperlinked documents could add to page counts.

86. Indeed it may be advisable to suggest that the parties consider agreeing on the manner or form of requests for documents and the minimum requirements that such request should meet.

87. It could be indicated in the Notes that, if a party objects to the production of documents, the parties may want to agree to refer such objections to the arbitral tribunal for determination. The Notes might also indicate the instances in document production when arbitral tribunal assistance might be called for (e.g. if a request is not complied with).

(a) Time limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission (paras. 48-49)

88. The Working Group may consider referring to the practice of asking the parties to agree on a timetable for the submission of evidence, which the arbitral tribunal can then confirm or amend as it sees fit.

89. The Notes might usefully clarify that if the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the arbitral tribunal may, after consultation with the parties, schedule the submission of documents and request document production separately for each issue or phase.

90. It may be considered whether, in relation to the late submission of evidence (para. 49), the Notes ought to be less prescriptive about when late submissions could be accepted, as users have indicated that late evidence can in some instances be helpful to the arbitral tribunal. Seeking prior permission of the arbitral tribunal may be one means to allay concerns in relation to the submission of late evidence.

91. The possible costs consequences in the event evidence is submitted late without sufficient cause could also be considered for inclusion in the Notes.

92. The common practice of requiring the parties to submit evidence concurrently with the written submissions could also be referred to.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence (paras. 50-51)

93. It may be considered whether this section could also include requests by parties to produce documents, and the form in which this might be done.

94. The Notes could set out what the request might contain: e.g. a description of the document(s) requested, a brief explanation as to a document's relevance and materiality and the reasonableness of the request.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate (para. 52)

95. In particular in light of the increasing prevalence of electronic disclosure in international arbitration, it may be considered whether any guidance should be added in relation to the provenance of documents disclosed only electronically, as well as

any issues relating specifically to electronic disclosure — for example, guidance relating to meta-data and electronic tagging of documents.

96. The Working Group may wish to include translations within the list set out in subparagraph (c) of Note 13.

(d) Are the parties willing to submit jointly a single set of documentary evidence (para. 53)

97. It may be considered whether the latter half of paragraph 53, beginning "When a single set of documents would be too voluminous" is applicable to jointly submitted documents only, or whether it would be equally suited to the entire set of documentary evidence produced by all parties. In any event, in relation to a possible table of contents, and in line with amendments suggested throughout the Notes in relation to technological updates, the Notes could refer to certain practices that are possible with electronic disclosure, including hyperlinked indexes (see also above, paras. 12, 25, 61 and 64, and below, para. 118).

98. Moreover it may be helpful for the Notes to clarify that the provision of a set of documents submitted jointly may not be the exclusive process for the submission of documents, and that there may be situations where both a joint set of documents and separate lists by the parties might be submitted.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples (para. 54)

99. The Working Group may wish to consider amending the title of this subparagraph "Voluminous and complex documentary evidence".

Note 14. Physical evidence other than documents (paras. 55-58)

(a) What arrangements should be made if physical evidence will be submitted (para. 56)

100. It may be useful for the Notes to consider cost implications and the allocation of expenses in consideration with the submission of physical evidence.

(b) What arrangements should be made if an on-site inspection is necessary (paras. 57-58)

101. It may be useful for the Notes to indicate the possibility of an agreed or tribunal-appointed expert to visit a site, and/or the possibility of facilitating electronic communications (e.g. videoconferencing) instead of physical site visits, in the interest of cost and time efficiency.

Note 15. Witnesses (paras. 59-68)

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements (paras. 60-62)

102. The Working Group may wish to consider whether the content of paragraphs 61-62 remains up to date, and moreover to consider how information on written witness evidence might fit with section (b)(i).

(b) Manner of taking oral evidence of witnesses (paras. 63-65)

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted (para. 63)

103. In addition, the Working Group may wish to consider including common terminology (e.g., "direct examination"; "cross-examination"; "re-examination"; etc.) and also to refer directly to the common practice of using witness statements in addition to hearing oral witness evidence. In relation to written witness evidence, it may be useful for the Notes to clarify that a written witness statement should include all documents relied upon as exhibits.

104. The Working Group may wish to consider whether the Notes should address the matter of whether the parties may re-examine their own witnesses after they have been questioned by the arbitral tribunal, and if so, what matters might be addressed in such a re-examination (for example, whether matters of substance previously raised may be addressed or whether only new matters arising after the date of a witness' most recent written statements, updated calculations contained in his or her written statement, and/or corrections to his or her testimony may be addressed). Likewise the Notes may indicate that a direct examination might be limited to topics raised in the witness statement.

105. The Working Group may wish to consider adding to the Notes a discussion on the consequences of a witness' failure to attend a hearing to provide oral testimony, including inferences that could be drawn from unexcused absences or the arbitral tribunal's discretion to determine the weight to be accorded to that witness' written evidence or not to admit that evidence at all.

(c) The order in which the witnesses will be called (para. 66)

106. The Notes may benefit from the insertion of the following language after the phrase "present the witnesses" in the second sentence of paragraph 66: "and the tribunal may ask the parties to try to agree on the timetable and sequence of witness examination, and the amount of time anticipated for each witness", and the deletion of the following phrase: "while it would be up to the arbitral tribunal (...) departures from it."

(d) Interviewing witnesses prior to their appearance at a hearing (para. 67)

107. It may be useful to add the following text to the end of paragraph 67: "and in particular the preparation of written statements. The arbitral tribunal may also wish to clarify what kind of contact a party can have with a witness while he or she is giving evidence in the arbitration."

Note 16. Experts and expert witnesses (paras. 69-73)

108. It is suggested that paragraph 69 could be redrafted as follows, to improve clarity: "Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. In some instances, the arbitral tribunal may appoint a single expert on issues in relation to which the arbitral tribunal has determined it requires expert guidance. Alternatively (or in addition), the parties may be permitted to present expert evidence. In some instances, if the respective experts appointed by the parties diverge widely in their findings, an arbitral tribunal may appoint an expert later in the proceedings."

109. It may be considered whether a single joint expert might be addressed in this paragraph or elsewhere in Note 16, and whether to include a reference to the practice of the giving of concurrent evidence by experts, chaired by the arbitral tribunal (also known in some jurisdictions as "hot-tubbing").

110. In addition, the Notes might refer to the possibility that an arbitral institution may be prepared to assist in the selection of experts.

(a) Expert appointed by the arbitral tribunal (paras. 70-72)

111. In paragraph 70, it is suggested that deleting the phrase "without mentioning a candidate" may dd clarity; such a contingency is provided for later in the sentence.

(i) The expert's terms of reference (para. 71)

112. It may be useful to reconsider subparagraph (a)(i), in order to address the terms of reference for both tribunal-appointed as well as party-appointed experts.

113. Users of the Notes have also indicated that terms of reference might highlight that the role of the expert is to assist the arbitral tribunal and not to act as advocate

for his or her instructing party. It may be useful for the Notes to refer to various jurisdictions' code of conduct in relation to the giving of evidence in courts.

114. Furthermore the Notes might indicate the desirability of clarification by the arbitral tribunal regarding who can communicate with the expert and whether communications between an expert and an expert's instructing party should be copied to the parties.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony (para. 72)

115. As with subparagraph (a)(i), the Working Group might consider redrafting subparagraph (a)(ii) to render it applicable to the reports of both tribunal- and party-appointed experts.

(b) Expert opinion presented by a party (expert witness) (para. 73)

116. It may be considered useful to include new provisions in Note 16 in relation to:

(i) The determination of issues to be addressed by experts in the context of party-appointed experts (currently addressed in part in paragraph 71, in relation to tribunal-appointed experts), in particular where the claimant(s) and respondent(s) intend to appoint respective experts;

(ii) Whether the arbitral tribunal might find it appropriate to request the expert witnesses to submit a joint report before the hearing, to specify the points where they agree or disagree;

(iii) Where both the claimant(s) and respondent(s) appoint different experts to address the same topics, guidance for the provision of any supplementary or responsive expert reports in relation to the same issues, or additional issues; and

(iv) Whether expert evidence should be submitted at the same time as a statement of case and/or witness statements, or after.

117. If not addressed in amendments to preceding paragraphs of the Notes, it may also be useful to include information on the type of guidance parties may give experts to assist with the drafting of the report, and whether expert's terms of reference and fees, where not already agreed by the arbitral tribunal, must be disclosed.

Note 17. Hearings (paras. 74-85)

118. It could be considered whether to include information in Note 17 regarding hearings assisted or conducted by technological means, or whether such issues relating to technological advances might be better expressed in a discrete note (see also above, paras. 12, 25, 61, 64 and 97).

119. Note 17 might also helpfully describe the admissibility of evidence new to the arbitration at the hearing.

(a) Decision whether to hold hearings (paras. 74-75)

120. It may be considered whether paragraph 75 could be clarified in respect of the factors mitigating for and against holding an oral hearing. For example, it is not clear why "a direct confrontation of arguments" need be an oral hearing rather than written advocacy; as presently drafted, the reference to "correspondence" in lieu of an oral hearing may be misleading.

121. Moreover, it may be useful to consider including, under this section, a differentiation between the decision to hold procedural hearings (which may be influenced by factors such as travel) and to hold substantive hearings on the merits (which may be less influenced by such factors).

122. In paragraph 75, it is suggested to amend the phrase in the final sentence from "may wish" to "ought", to reflect the principle that the determination of whether or

not oral hearings would be required is a matter in which the parties might be well placed to provide input.

(b) Whether one period of hearings should be held or separate periods of hearings (para. 76)

123. As a matter of drafting, it may be preferable to refer to "hearings" in the singular ("hearing"), as whether to divide a "hearing" into separate periods might thus be clearer.

124. It may also be considered whether this section should be divided into hearings on procedural issues, which typically take place at specified intervals or when a need arises, and substantive hearings on the merits. Likewise the Notes might include common case management practices such as holding hearings in a single period, but over four rather than five days per week.

125. It is suggested to delete the phrase "and it is unlikely that people representing a party will change", in the fifth sentence, which might be confusing, and in any event, not related to whether there are separate periods of hearings.

(c) Setting dates for hearings (para. 77)

126. It is suggested that the Notes address the desirability, as a preliminary matter, of encouraging the arbitral tribunal and the parties to fix a date for the hearing as early as possible.

(e) The order in which the parties will present their arguments and evidence (para. 80)

127. In line with general amendments to reflect technological changes, the arbitral tribunal may wish to consider whether the parties' representatives should be able to use presentation aids (such as PowerPoints) and whether they should provide a copy of their slides to the other party and/or arbitral tribunal.

(g) Arrangements for a record of the hearings (paras. 82-83)

128. It may be considered whether this section should be updated to reflect current practice, both in terms of substantive matters and technological ones.

129. It might be useful to include guidance as to the purpose or proposed use of a record of proceedings prepared by the arbitral tribunal or the secretary of the arbitral tribunal; for example, whether such a record is for the benefit of the arbitral tribunal alone, or whether it is discloseable to the parties or subject to their approval.

130. Moreover, it might be considered whether to add that the parties and the arbitral tribunal may agree to establish a time frame for the parties to approve or amend the changes to the transcript, so that there is no substantial delay between the date of the hearing and the date of the approved and correct transcript of the same.

131. It might furthermore be useful for the Notes to address the pros and cons of certain practical issues such as the provision of interpretation (whether simultaneous or consecutive) and the remote attendance of witnesses (e.g. by video link).

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments (paras. 84-85)

132. Subparagraph (h) could consider, in the event post-hearing briefs or notes summarizing oral arguments are permitted, whether to limit their length or content and whether they should be submitted simultaneously or consecutively.

133. The Notes might furthermore clarify that at the end of a hearing, the arbitral tribunal will probably request the parties to submit their notes on costs and fees in a fixed time frame. The time frame as well as the format, and the question as to whether and in what time frame the other party is entitled to make comments on the cost and fee submission, should be clarified.

Note 18. Multi-party arbitration (paras. 86-88)

134. Note 18 has been considered by some users of the Notes insufficiently detailed. It may be useful to consider setting out specific guidance on elements of proceedings that would require modification in the context of a multi-party arbitration, and clarification as to the primary procedural differences between multi-party and two-party arbitration. Such guidance could be included in Note 18, or in subparagraphs as addenda to the relevant Notes (see also above, para. 14).

135. It may also be considered whether issues in relation to joinder and consolidation ought to be addressed, and if so, whether information in that respect should be included in this Note or in a separate Note.

Note 19. Possible requirements concerning filing or delivering the award (paras. 89-90)

136. It might be useful to include information in relation to the rendering of the award; some users of the Notes have suggested that before closing proceedings, the arbitral tribunal should ensure that time has been reserved in each of the arbitrators' diaries for deliberation promptly thereafter; or that, even absent statutory requirements in a particular country, that the parties may wish to consider asking the arbitral tribunal to agree to deliver a final award within a set period. If such topics are covered in Note 19, the title of that Note would need to be amended.

C. Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

(A/CN.9/WG.II/WP.184)

[Original: English]

Contents

I. Introduction

1. In preparation for the sixty-first session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to proceed with its consideration of the UNCITRAL Note on Organizing Arbitral Proceedings[1] and how they should be revised, international organizations have submitted comments for consideration by the Working Group. The comments are reproduced as an annex to this note in the form in which they were received by the Secretariat.

II. Comments received from international organizations

A. International Chamber of Commerce (ICC) — Commission on Arbitration and ADR

The ICC Commission discussed and responded to the following questions regarding the UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes"):

1. The Notes are most useful as a checklist, explaining and drawing attention to problems and issues without giving recommendations. Does the Commission wish to see any further Recommendation or Guidelines as to the best practice in international arbitration?

The Commission recommends updating the Notes given the time that has elapsed since their publication, and the remarkable evolution of arbitration realities and practices.

2. Should international commercial arbitration and investment arbitration be considered separately in the Notes to provide specific information in relation to investment arbitration or should specific information be addressed within certain specific Notes (such as confidentiality issues) only?

The Commission does not recommend the elaboration of separate Notes for investment arbitration. The experience rather shows that the procedure for commercial and investment international arbitration is organized in a similar manner. The Commission, however, recommends that the UNCITRAL Notes refer to the ICC Commission Report on ICC Arbitration Involving States and

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II. *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

State Entities, where some suggestions regarding arbitration involving public entities are made.

3. Does the Commission wish to see, under the preliminary Note "Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings", a reference to other well-known sets of arbitration rules which contain similar principles to conduct the arbitration in an expeditious and cost-effective manner (such as the ICC Rules)? Should reference also be made to the ICC Commission Report on Controlling Time and Costs in Arbitration?

In addition to the Commission's Report on ICC Arbitration Involving States and State Entities referred to above, the Commission also recommends that the UNCITRAL Notes refer to the ICC Commission's Report on Time and Costs in International Arbitration.

4. In a more general sense, should the UNCITRAL Notes refer to other well-known Rules or Documents such as the IBA Rules on the Taking of Evidence in International Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration, ICC Rules and ICC Commission Reports?

The Commission recommends that the UNCITRAL Notes refer to well-known and often used arbitration soft law such as the IBA Rules on the Taking of Evidence in International Arbitration, the IBA Guidelines on Conflicts of Interest in International Arbitration, the ICC Rules and ICC Commission Reports.

5. Should the Notes address the active involvement of in-house counsel at the "pre-hearing conference"/"case management conference" and at the "hearing stage"?

The Commission recommends that the Notes underline the importance of the involvement of in-house counsel at the "pre-hearing conference"/"case management conference" and at the "hearing stage" in order to organize more effective and cost-efficient arbitral proceedings.

6. What are the Commission's views as to the extent an arbitral tribunal can or should take decisions without previous consultation of the parties on organizing arbitral proceedings, especially with respect to paragraph 7 of the Notes?

The Commission recommends that the UNCITRAL Notes refer to the need for arbitral tribunals to make proposals to the parties so as to render arbitral proceedings more effective and cost-efficient. The Commission, however, recognizes that arbitral tribunals should respect agreements reached by the parties as to the conduct of the arbitral proceedings.

7. In relation to the comments received on paragraph 15 of the Notes, does the Commission believe that the Notes should specify why the consideration of a set of arbitration rules might delay the proceedings or give rise to controversies? Additionally, should the Notes not also refer to reverse situations where agreeing on a set of arbitration rules can be done fairly quickly and might also accelerate proceedings?

The Commission recommends that the UNCITRAL Notes no longer state that attempting to agree on a set of arbitration rules might delay the arbitral proceedings. Experience shows that this is not true in most of the cases. Conversely, the Commission recommends that the UNCITRAL Notes underline the importance for the parties to choose a set of arbitration rules to govern the arbitral proceedings.

8. In relation to paragraph 19 of the Notes, does the Commission agree that in practice, interpretation as well as translation services are often not arranged by the arbitral institution, but by the parties?

The Commission members have so confirmed on the basis of their experience.

9. Does the Commission agree that the arbitral practice has evolved in relation to the appropriateness of an arbitral tribunal recommending settlement as referred to in Note 12? In particular, does the Commission agree that an arbitral tribunal should only propose settlements when agreed between the parties and the arbitral tribunal?

The Commission agrees that arbitral practice has evolved in relation to the involvement of an arbitral tribunal facilitating settlement. The Commission considers it appropriate for an arbitral tribunal to inform the parties that they are free to settle all or part of their dispute either by negotiation or through any form of alternative dispute resolution methods, such as, for example, mediation. Further, where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

10. Should the Notes address the arbitral tribunals' decisions as to costs in much more detail in the revised notes and address costs consequences as a way of sanctioning improper conduct of the parties and unjustified delays in the provision of evidence?

The Commission recommends that the UNCITRAL Notes refer to the proposals relating to costs contained in the ICC Commission Report on Controlling Time and Costs in Arbitration (see in particular paragraph 82 entitled "Using allocation of costs to encourage efficient conduce of the arbitration"). The UNCITRAL Notes may also refer to the forthcoming ICC Commission's Report on Decisions as to Costs in Arbitration, to be published shortly.

11. Does the Commission agree that the Notes should also address the possibility of the appointment of experts by arbitral institutions, such as the ICC International Centre for Expertise and that mention should be made to the ICC Rules on the Appointment of Experts?

The Commission recommends that the UNCITRAL Notes address the possibility of the appointment of experts by arbitral institutions, such as the ICC International Centre for ADR, and that mention be made of the ICC Rules for the Appointment of Experts and Neutrals and the ICC Rules for the Proposal of Experts and Neutrals.

B. International Council for Commercial Arbitration (ICCA)

The International Council for Commercial Arbitration (ICCA) is a worldwide non-governmental organization. ICCA's object is "to promote knowledge about, and use of, arbitration and other forms of international dispute resolution, to enhance the effectiveness and legitimacy of such processes, and to harmonize best practices in international dispute resolution" (ICCA Constitution, Article 2). ICCA's activities include making submissions to international entities on matters relating to its object (ICCA Bylaws, Article 1(f)).

ICCA submits the following comments regarding the proposed revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (the Notes) (1996). [2] References are to the introductory paragraph numbers and numbered headings in the 1996 edition of the Notes.

Introduction — general

ICCA agrees with the Secretariat's proposal that paragraphs 7 to 9 of the Introduction, which address consultations between parties and an arbitral tribunal on procedural matters, could be better dealt with in the body of the Notes, specifically under Note 1, "Set of arbitration rules". In addition, ICCA considers that within Note 1 it

[2] This Submission was prepared by the Drafting Committee for the ICCA Drafting Sourcebook for Organising International Arbitrations.

may be desirable to mention the practice of preparing a written "Procedural Calendar" following the pre-hearing conference.

Introduction — "Purpose of the Notes"

ICCA proposes that paragraph 11, which appears under the heading "List of matters for possible consideration in organizing arbitral proceedings", should be consolidated with paragraph 1, which appears under the heading "Purpose of the Notes". Paragraph 1 addresses the purpose of the Notes from a positive perspective, noting that the purpose is "to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful." The point made in paragraph 11, that "the purpose of the Notes is not to promote any practice as best practice" could usefully be made in paragraph 1, thus giving context to all recommendations that follow.

Introduction — "Process of making decisions on organizing arbitral proceedings"

Paragraph 7 suggests that it is a matter for the tribunal to decide whether in any particular case it would be useful to consult with the parties prior to making organizational decisions. ICCA considers that the Notes should rather encourage consultation with the parties on organizational decisions, perhaps stating that consultation is the default option, to be adopted except in those situations where the tribunal considers it unnecessary.

Paragraph 8 refers to "telefax" — ICCA proposes that this reference be eliminated and replaced with a more general term covering electronic communications that will be applicable even as technology advances.

Introduction — "List of matters for possible consideration in organizing arbitral proceedings"

Paragraph 12 specifically raises the risk of raising matters prematurely: "[g]enerally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed." While this risk is noted, ICCA considers that it should be weighed against the risk that, in an attempt to avoid discussions and delay at an early stage, delays may arise later in the proceeding, potentially putting hearing dates at risk.

Note 1. Set of arbitration rules

ICCA agrees that some mention should be given to the possibility of utilizing institutional support for an arbitration under the UNCITRAL Rules, and of the relevant factors to be considered when deciding whether to opt for institutional or ad hoc arbitration, and, if institutional, which institution to select. ICCA considers that the inclusion of references to institutional rules is important in preserving the goal of the Notes "not to promote any practice as best practice", as described in paragraph 11 of the Introduction.

Note 4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

ICCA proposes that regard be had to ICCA Reports No. 1, Young ICCA Guide on Arbitral Secretaries (available for free download on the ICCA website, www.arbitration-icca.org), which addresses the issues of disclosure of an arbitral secretary's involvement in a case and the arbitral secretary's remuneration. In addition, it may be considered whether the possibility of requiring a statement of independence and impartiality from an arbitral secretary should be discussed, as it is increasingly common for such statements to be furnished by prospective arbitral secretaries (this issue is also discussed in the Young ICCA Guide on Arbitral Secretaries).

Note 7. Routing of written communications among the parties and the arbitrators

The UNCITRAL Secretariat proposes clarifications to this Note as regards electronic communications. ICCA would add that a part of this clarification could include a reference to making an agreement about applicable deadlines in the event that the parties and tribunal members are not all in the same time zone.

Note 10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

ICCA proposes that in revising this Note, consideration could be given to actively encouraging the exchange of electronic, rather than hard copy, submissions in appropriate cases.

Note 13. Documentary evidence

While the current drafting of Note 13 provides that "[p]rocedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents", ICCA suggests that it may be appropriate to refer to the relevant provisions of the IBA Rules on the Taking of Evidence in International Arbitration as evidence of an approach that is commonly adopted.

Note 15. Witnesses

ICCA notes the reference in paragraph 61 under Note 15 to the view of some practitioners that prepared witness statements are not appropriate to the extent that they result from what may, in some jurisdictions, be considered improper contact with the witness prior to the hearing. ICCA suggests that the Note could be revised to mention steps that can be taken to promote the credibility of the evidence provided in prepared witness statements: e.g. (i) by providing for cross examination of the witness at the final hearing, and (ii) by requiring a clear statement from the witness attesting to the truth of the statement ("I confirm that the facts and matters I describe below are within my own knowledge and are true to the best of my recollection").

Further, it could be considered whether to add a discussion as to the consequences of a witness' failure to attend a hearing to provide oral testimony, having submitted a written witness statement. One possible consequence would be to require the striking of the written testimony from the record, while an alternative would be to leave a determination to the discretion of the arbitral tribunal on a case-by-case basis.

As regards paragraph 63 under Note 15, ICCA would propose amending the paragraph to include the commonly-used terminology for the questioning of witnesses — "direct examination" and "cross examination". UNCITRAL may also wish to consider mentioning the possibility of allowing the parties to conduct "re-examination" and "re-cross examination".

Note 16. Experts and expert witnesses

ICCA agrees with the UNCITRAL Secretariat's proposed revision of paragraph 69. ICCA proposes that the paragraph could be further amended to refer to the situation in which an arbitral tribunal may appoint an expert later in the proceeding if the experts appointed by the parties vary greatly in their findings.

Regarding the possibility of adding new provisions to Note 16, as noted by the UNCITRAL Secretariat under subheading (b) of its comments on this note, ICCA would agree with the matters proposed for consideration by the Secretariat, and would further suggest that consideration be given to the idea of addressing how experts will present their testimony, and particularly to the possibility of expert conferencing.

Note 17. Hearings

ICCA proposes that consideration be given to adding a reference to the use of the evidence at the hearing. In particular, (i) whether one party, the parties or the arbitral

tribunal will be responsible for making the entire (pre-hearing) evidentiary record available at the hearing; and (ii) whether, and, if so, in what circumstances, evidence presented for the first time at the hearing will be admissible.

With regard to paragraph 78 of the Notes, for completeness it could be considered whether to include a reference to the time taken for the examination of experts (whether party- or tribunal-appointed), and to the time to be taken by the arbitral tribunal for its questioning of fact witnesses and expert witnesses.

Note 19. Possible requirements concerning filing or delivering the award

It may be considered whether a note could usefully be added to the effect that, in the interests of efficiency and predictability, even absent statutory requirements in a particular country, the parties may wish to consider asking the arbitral tribunal to agree to deliver a final award within a set period.

Additional topics

ICCA considers that it may be desirable, whether in the Notes or in a discrete note, to consider logistical and confidentiality issues arising from the participation of non-disputing parties/amici in investment treaty cases, whether arising from their making of submissions, or their attendance at hearings.

In addition, in Note 17 on Hearings, it may be considered appropriate to add a specific reference to the possibility of holding a pre-hearing meeting of the tribunal in order to discuss the case and prepare a list of questions and issues that it would like the parties to address at the hearing.

C. Arbitration Institute of the Stockholm Chamber of Commerce

UNCITRAL Notes on Organizing Arbitral Proceedings

The SCC comments are focusing on issues where an explicit edit of the text is proposed. In addition, SCC comments focus on issues where the arbitral institution would typically be involved, or where a certain situation is typically addressed by institutional rules.

UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Annotations

INTRODUCTION

General

In addition to the Secretariat's proposal to include in the introduction a general remark regarding the desirability of consultations between the arbitral tribunal and the parties, the introduction may also bring to the attention of the reader that procedural issues may be governed by 1) lex arbitri (sometimes mandatory), 2) the applicable arbitration rules, and 3) the agreement between the parties. For reasons of clarity, the introduction may also clearly state that the Notes are not rules but serve as guidelines in regard to procedural matters in the absence of such rules and/or agreements by the parties (in lieu of the reference to this effect in Section 13).

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

A reference to Article 19 of the SCC Rules could be included in footnote 1, as suggested by the Secretariat.

Process of making decisions on organizing arbitral proceedings

The SCC supports the Secretariat's proposal to mention in the introduction that it is desirable that the arbitral tribunal hold consultations with the parties concerning procedural matters. This is also in line with the principle of party autonomy.

ANNOTATIONS

Note 1. Set of arbitration rules

It could be considered to re-phrase Section 14 in such a way that should the arbitral tribunal find reasons to bring the issue to the attention of the parties, it may do so.

Note 2. Language of proceedings

(b) Possible need for interpretation of oral presentations

The SCC notes that the last sentence of Section 19, "In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution", may not apply to many institutions (including the SCC), and therefore suggests a re-phrasing of this text to reflect this circumstance.

Note 3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

In line with the principle of party autonomy, it is proposed that the arbitral tribunal consult the parties before deciding on the place of arbitration, as a default rule. It may be noted, however, that this issue is also addressed directly by some institutional rules.

Note 4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

The SCC appreciates the approach taken by the Secretariat to divide this Note into two sections, one addressing the matter of administrative services for hearings, and one addressing secretarial support.

For reference, the questions regarding the appointment and the remuneration of an administrative secretary for the arbitral tribunal are addressed in the SCC Arbitrator's Guidelines (available at www.sccinstitute.com). Arbitrators are requested to adopt the following procedure for the appointment and remuneration of an administrative secretary in a SCC arbitration:

> "*If the arbitral tribunal wishes to appoint an administrative secretary, the SCC should be informed of whom the arbitral tribunal wishes to appoint. The SCC will then proceed to ask the parties whether they agree to the appointment. If any party disagrees, the arbitral tribunal may not appoint the suggested individual as secretary.*
>
> *The fee of the secretary is borne by the arbitral tribunal. The arbitral tribunal decides how the fee should be allocated. Any expenses that the secretary incurs are borne by the parties. The same applies to social security contributions. The fee of the secretary should be stated in the final award.*"

The current wording of Sections 24 and 25 suggesting that arbitral institutions "usually provide all or good part of the required administrative support to the arbitral tribunal" may need redrafting as this practice may vary greatly between different institutions.

In addition, it may be noted that in recent years hearing centres have opened in many cities which offer full-service-support for arbitral hearings, i.e. organizing accommodation, administrative support, interpretation, court reporters, meals, etc. Parties and tribunals may be well advised to explore such possibilities at the seat of arbitration, or other venue chosen for the hearing. As reference, see www.sihc.se.

Note 5. Deposits in respect of costs

(a) Amount to be deposited

The SCC supports the Secretariat's suggestion to include guidance where arbitration rules do not specify if all parties or simply the claimant is to make the deposit, as well as to address circumstances where the deposit is not made in full by all parties.

Note 6. Confidentiality of information relating to the arbitration: possible agreement thereon

For the purpose of clarification, it could be considered to mention the distinction between ”private” and ”confidential” in this regard, as meetings in commercial arbitral proceedings are always private but are confidential only if the parties have agreed thereon.

A reference to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration may be well placed, and briefly explained, in this section, unless addressed in a separate Note.

Note 7. Routing of written communications among the parties and the arbitrators

The SCC supports the suggestion of the Secretariat to amend Note 7 to better correspond with technological advances. It could also be considered to mention in this Note that ex-parte communications should be refrained from as well as indicating that the arbitral tribunal should consider to what extent formal services are required.

Note 8. Telefax and other electronic means of sending documents

The SCC supports the suggestion of the Secretariat to amend Note 8 to correspond with technological advances. Provisions on communications are best served by not specifically targeting certain means of communication, as this tends to continuously change over time, but rather focus on information integrity. The potential need to specifically target information security measures may also be addressed in this context, i.e. encryption or similar measures.

Note 10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

The SCC agrees with the Secretariat’s proposal to amend the Note to correspond with technological advances. Again, however, if possible it would be preferred if the text could be as neutral as possible in relation to certain types of technical tools and/or solutions.

Note 18. Multi-party arbitration

The SCC supports the Secretariat’s suggestion to address the issues of joinder and consolidation in a separate Note. It may be noted that this situation to an increasing extent is addressed by institutional rules, from which additional guidance may be sought on this potentially complex issue.

Note 19. Possible requirements concerning filing or delivering the award

It is advisable to clarify in Section 89 that the applicable law of the seat of arbitration or applicable arbitration rules may contain requirements as regards the delivering of the award. For reference purposes, see also the recommendations made by the SCC in the SCC Arbitrator’s Guidelines in this regard:

> “*The arbitral tribunal should promptly send an original of the award to the parties. The SCC does not notify the parties of the award, final or separate, or of any other decision made by the arbitral tribunal. A copy of proof of dispatch of the award to the parties should be sent to the SCC. In addition, the arbitral tribunal is recommended to request that the parties confirm receipt of the award and that the original of the award is distributed by courier or registered mail.*”

COMMENTS ON POSSIBLE ADDITIONAL TOPICS

(a) Investment arbitration

The SCC supports the proposal that issues specific to investment arbitration be addressed in a separate Note and would be prepared to share the SCC experience from investor-State disputes for the purpose of such separate Note.

(b) Costs

Practical experience regarding the issue of allocation of costs in international arbitration has been addressed by institutional initiatives, which could provide useful input in this context. The SCC is also currently finalizing two reports on the allocation of costs in SCC commercial arbitration cases and investor-State arbitrations under the SCC Rules, which will be available later this year.

(c) Interim measures

Decisions on interim measures may to a large extent be subject to the applicable law, as well as specific arbitration rules. General practical guidance, as foreseen in these Notes, may therefore be difficult to provide.

(d) Technology

The use of modern technology may come into play throughout the arbitration, and therefore reference to issues of technology may be best served by continuous references throughout the text, rather than a specific chapter on this topic. However, we concur completely with the opinion expressed in the Secretariat's note that any reference or guidance relating to technology should be sufficiently general so as to not become quickly obsolete.

D. Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015)

(A/CN.9/832)

[Original: English]

Contents

I. Introduction

1. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[1] (the "Notes") could be considered as a topic of future work.[2] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[3] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010.[4] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the preparation of a convention on transparency in treaty-based investor-State arbitration.[5] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second sessions, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[6]

2. At its forty-seventh session, the Commission further agreed that, in addition to the revision of the Notes, the Working Group should consider at its

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[1] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.
[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.
[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.
[4] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.
[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.
[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 122 and 128.

sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[7] The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[8]

3. At its forty-seventh session, the Commission also recalled that it had identified, at its forty-sixth session, in 2013,[9] that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration. In relation to that item, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area. The Commission requested the Secretariat to report to the Commission, at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[10]

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-second session in New York, from 2-6 February 2015. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, France, Georgia, Germany, Greece, India, Indonesia, Italy, Japan, Kuwait, Mexico, Pakistan, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Finland, Guatemala, Libya, Netherlands, Norway, Portugal, Romania, Somalia, South Africa, Sweden and Viet Nam.

6. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations System*: World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association Suisse de l'Arbitrage (ASA), Belgian Center for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Centre for International Environmental Law (CIEL), Chartered Institute of Arbitrators (CIARB), CISG Advisory Council (CISG-AC), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Chamber of Commerce (ICC),

[7] A proposal for future work in relation to enforcement of international settlement agreements considered by the Commission at its forty-seventh session is contained in document A/CN.9/822.

[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123 to 125 and 129.

[9] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 131 and 132.

[10] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 126, 127 and 130.

International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Conflict Prevention and Resolution (CPR), International Law Institute (ILI), International Mediation Institute (IMI), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL) and Swedish Arbitration Association (SAA).

8. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland)

Rapporteur: Mr. Prem K. Malhotra (India)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.185); (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.186) and regarding enforceability of settlement agreements resulting from international commercial conciliation/mediation (A/CN.9/WG.II/WP.187 and A/CN.9/WG.II/WP.188).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Enforcement of settlement agreements resulting from conciliation proceedings.
5. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.
6. Organization of future work.
7. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 and resumed its work on agenda item 5 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.186, A/CN.9/WG.II/WP.187 and A/CN.9/WG.II/WP.188). The deliberations and decisions of the Working Group with respect to items 4 and 5 are reflected in chapters IV and V, respectively.

12. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a draft of revised UNCITRAL Notes on Organizing Arbitral Proceedings, based on the deliberations and decisions of the Working Group, for consideration by the Commission at its forty-eighth session, to be held in Vienna, from 29 June-16 July 2015.

IV. Enforcement of settlement agreements resulting from international commercial conciliation/mediation

A. General remarks

13. It was noted that the Commission, at its forty-seventh session, agreed that the Working Group should consider the issue of enforcement of settlement agreements

resulting from conciliation/mediation[11] based on a proposal to prepare a convention, modelled on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") (see A/CN.9/822).

14. The Working Group recalled that UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002) (the "Model Law on Conciliation" or the "Model Law"), which formed the basis of an international framework for conciliation. The issue of enforcement of settlement agreements had been considered when preparing the Model Law on Conciliation[12] resulting in article 14 which provided as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

15. It was generally agreed that conciliation, as a means of resolving commercial disputes, should be promoted. The benefits of conciliation were also highlighted, such as reducing the instances where a dispute would lead to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings for the parties.

16. The Working Group decided to first consider the legal and practical issues that could arise from a convention on enforcement of settlement agreements and later to assess the feasibility of preparing such a convention.

B. Legal and practical questions

Nature of the instrument to be developed

17. It was said that providing a mechanism to enforce settlement agreements would make conciliation a more efficient means for resolving commercial disputes. During the discussion, the Working Group heard the results of an empirical study on the use of conciliation, which consisted of a survey of different categories of users. The survey found that, in the view of those responding, (i) it was generally more difficult to enforce settlement agreements outside the State in which the agreements were concluded; and (ii) the lack of a harmonized enforcement mechanism was a disincentive for parties to proceed with conciliation.

18. In that context, it was said that a convention providing such a mechanism would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement agreements could be relied on and easily enforced. It was further said that such a convention would provide a clear and uniform framework for facilitating enforcement in different jurisdictions. In addition, it was mentioned that the preparation of a convention would itself encourage the use of conciliation.

19. However, it was underlined that preparing a convention might be a lengthy process. By way of illustration, it was said that the New York Convention, which followed the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), built upon the experience gained through long years of arbitration practice. In contrast, it was said that, in some States, there was a lack of experience in international conciliation, particularly due to the diversity in conciliation processes as well as different legal traditions. It was suggested that a more gradual approach should be taken to harmonize the regime of enforcement of settlement agreements, possibly starting from the harmonization of domestic legislation.

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[11] The terms "conciliation" and "mediation" are used interchangeably as broad notions referring 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 (see article 1(3) of the Model Law on Conciliation and para. 5 of its Guide to Enactment and Use).

[12] *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex I.

20. It was further pointed out that article 14 of the Model Law merely stated the principle that settlement agreements were enforceable, without attempting to specify the method by which such settlement agreements might be enforced, a matter which had been left to each enacting State. It was suggested that the circumstances that led to that result had not changed since the adoption of the Model Law and that the Working Group might face similar difficulties in addressing the issue as when it prepared article 14 of the Model Law.

21. It was further questioned whether an international mechanism on enforcement might result in a more cumbersome review of settlement agreements than under current domestic mechanisms. It was pointed out that a contract could circulate without formalities or control in any State, the situation being different for a foreign judgment or an arbitral award. In that regard, it was stated that further analysis of the domestic legislation and its implementation would greatly assist the Working Group in evaluating the need for, and the feasibility of, a convention. The Working Group recalled that a questionnaire on the legislative framework on enforcement of international settlement agreements resulting from mediation had been circulated by the Secretariat. The Working Group was informed that the replies received would be available for the Commission at its forty-eighth session, in 2015. It was proposed that the Secretariat should reiterate the invitation to States to respond to the questionnaire (see above, para. 2).

22. It was questioned how an international instrument on enforcement of settlement agreements would interact with domestic legislation on conciliation. It was suggested that procedural issues addressed by the Model Law should not be reopened by a convention on enforcement of international settlement agreements. It was clarified that the envisaged convention would not address the procedural aspects dealt in domestic legislation and would only introduce a mechanism to enforce international settlement agreements.

23. It was suggested that the aim should be to provide a simple mechanism to enforce settlement agreements. It was further mentioned that flexibility of the conciliation process should be preserved. Nonetheless, the concern was expressed for the need to ensure respect for public policy of the State in which the enforcement would be sought (see also below, para. 31).

24. It was said that many multinational businesses had difficulties convincing other parties to attempt conciliation because of questions regarding the international standing of conciliation and the enforceability of resulting settlements. It was also said that there were many instances in which attempts to enforce a settlement agreement led to re-litigation on the merits.

New York Convention as a model

25. A question was raised as to whether the New York Convention would be the appropriate model for preparing a convention on enforcement of settlement agreements. In that context, the Working Group considered whether a convention should also address recognition of the agreement to submit a dispute to conciliation and the settlement agreement. It was said that the exclusive nature of the arbitration agreement (referring a dispute to arbitration) created the need for the recognition, which did not necessarily arise with respect to conciliation.

26. It was further questioned whether a convention on enforcement of settlement agreements should refer to “foreign” as opposed to “international” settlement agreements. By way of comparison, it was noted that the Model Law on International Commercial Arbitration (1985, as amended in 2006) (the “Model Law on Arbitration”) referred to enforcement of awards “irrespective of the country in which [they] were made” in its article 35, while the New York Convention referred to the enforcement of “foreign” arbitral awards.

27. It was stated that one of the key questions that would need to be addressed in a convention was how to determine the notion of “international” and the relevant criteria for such determination (for example, based on a territorial approach (place

where the conciliation took place or place of conclusion of the settlement agreement), a personal approach (parties' place of business) or an approach based on the law applicable to the settlement agreement). It was suggested that the notion of "settlement agreement" would also need to be determined.

28. With regard to a suggestion that the scope of a convention should be limited to international settlement agreements, concerns were raised about the potential detrimental effect of a convention that would treat international and domestic settlement agreements differently.

29. It was further stated that a settlement agreement differed quite significantly from an arbitral award and therefore, caution should be taken when making an analogy. In that context, reference was made to article 30 of the Model Law on Arbitration which provided that the arbitral tribunal should record the settlement in the form of an arbitral award on agreed terms, if requested by the parties and on the condition that the arbitral tribunal itself had no objections (see below, para. 39).

30. It was mentioned that the introduction of an enforcement mechanism for settlement agreements could blur the distinction that currently existed between arbitration and conciliation by adding more formal requirements to conciliation.

31. It was questioned whether a procedure similar to that of article V of the New York Convention could be envisaged for a convention providing grounds to refuse enforcement. It was further stressed that the public policy of the State in which the enforcement would be sought could constitute a ground for refusing enforcement (see above, para. 23).

Other international instruments

32. While a point was made that the Convention on the Choice of Court Agreements (2005) prepared by the Hague Conference on Private International Law (the "Hague Conference") could shed some light on the project (particularly, article 12), it was generally felt that the scope of that Convention was quite distinct from the issue at hand. It was further mentioned that the Secretariat had been in communication with the Permanent Bureau of the Hague Conference on the proposed project for a convention on enforcement of settlement agreements and it had been identified that the work by the Hague Conference on the enforcement of mediated agreements in the context of international family contracts might raise similar issues with respect to the proposed convention.

Settlement agreement to be enforced

33. It was stated that very few settlement agreements required enforcement as most parties would abide by the terms of the settlement agreement.

34. It was said that the type of obligations stipulated in a settlement agreement might be broad. Elements of complexities pertaining to settlement agreements were mentioned, such as reciprocal obligations, or conditions for the implementation of obligations that would render enforcement more complex. It was also stated that settlement agreements usually contained dispute settlement clauses to resolve disputes arising from the agreement.

35. A view was expressed that the contractual nature of the settlement agreement should be preserved. Concerns were raised that treatment of settlement agreements as distinct from an ordinary contract could distort the law of contracts. In response, it was argued that while a settlement agreement was contractual in nature, it might deserve a different treatment as it was the result of a procedure to resolve a dispute.

36. It was suggested that a convention should not deprive the parties of the contractual remedies provided under the applicable contract law.

37. A question was raised as to whether any regime that would be created by a convention on enforcement of settlement agreements would be optional in nature and would allow the parties to either opt-in or out of that regime. It was said that a convention should take into consideration the need to respect party autonomy and for

instance, consent would be required to make any settlement agreement directly enforceable. It was suggested that in order to both simplify enforcement and provide a mechanism that would take account of party autonomy in relation to enforcement of settlement agreements, it should suffice that the parties expressly confirmed in the settlement agreement itself that they intended to make such agreement subject to enforcement under the convention.

38. A question raised concerned the interrelationship between a contractual claim based on the breach of a settlement agreement and the enforcement of the settlement agreement itself.

39. It was highlighted that some domestic legislation treated a settlement agreement in a manner similar to an arbitral award for the purpose of enforcement. It was further noted that some legislation permitted a settlement agreement to be recorded as an arbitral award on agreed terms ("consent award") when certain conditions were met (see above, para. 29). In that context, arbitration institutions were invited to provide information on the number of consent awards rendered, so as to provide an indication of the significance of such practice.

40. Concerns were raised about specific issues pertaining to the enforcement of settlement agreements that included non-monetary aspects, in light of the fact that certain domestic legislation imposed restrictions on such non-monetary obligations.

41. In response, it was argued that the scope of a convention should cover all types of settlement agreements, without limitations as to the remedies or nature of obligations that would be provided under those agreements. It was also pointed out that in many States, there were existing instruments to enforce monetary obligations (for example, through the issuance of a bill of exchange or a promissory note). It was pointed out that the New York Convention applied to monetary as well as non-monetary obligations resulting from an award.

42. It was also argued that the scope of a convention could cover not only settlement agreements resulting from conciliation but also those resulting from mere negotiation between the parties.

43. It was suggested that settlement agreement involving consumers might be excluded from the scope of the convention.

Validity of the settlement agreement

44. A question was raised as to whether a court enforcing a settlement agreement under the proposed convention would have jurisdiction to also consider the validity of that agreement.

C. Feasibility and possible form of future work

45. The Working Group then discussed the various solutions to address the enforcement of settlement agreements. In doing so, it was suggested that any recommendation to the Commission as to possible work in the area should be made when there was reasonable expectation that the issues identified could be resolved.

Domestic legal framework

46. A question was raised as to whether States had adopted domestic legislation to address the issue of enforcement of settlement agreements, as contemplated by article 14 of the Model Law. It was suggested that if States had not yet adopted such legislation, it would be preferable to first concentrate on promoting the development of domestic legislative frameworks and work on an international instrument at a later stage.

47. In response, the Working Group was informed that a number of States had adopted legislation to provide for enforcement of settlement agreements (see document A/CN.9/WG.II/WP.187, paras. 21 to 30). During the discussion, the following information was provided to the Working Group.

48. Some States had no specific legislation on enforcement of settlement agreements, with the result that contract law would apply. However, it was noted that despite the absence of legislation, courts in a jurisdiction adopted an expedited and streamlined process for the enforcement of domestic settlement agreements. Other States had legislation providing for enforcement of settlement agreements as court judgements, where the agreement was approved by a court. Some States permitted enforcement of settlement agreements through summary proceedings, provided that the agreement was signed by the mediator or by the parties and that the agreement contained a statement expressing the parties' intent to seek summary enforcement. Other States required deposition or registration of the agreement at a court for it to be enforceable. The practice of requiring a notary public to notarize the settlement agreement or establishing a public deed was adopted by some States. Other States had legislation which permitted parties who have settled a dispute to appoint an arbitral tribunal for the specific purpose of issuing a consent award based on the agreement of the parties. It was also highlighted that certain States provided for more than one measures mentioned above to enforce settlement agreements.

49. It was noted that those developments in domestic legislation since the adoption of the Model Law on Conciliation were an indication that States were giving importance to the matter, and that it might be timely to consider future work in the area.

Enforcement of the settlement agreement or of an instrument giving force to the settlement agreement

50. It was questioned whether a convention should make settlement agreements directly enforceable or whether it should incorporate a control mechanism. For instance, it was questioned whether a settlement agreement would need to be authenticated to benefit from any enforcement procedure and, if so, the competent authority (the conciliator, an institution or a court) and the procedure of obtaining authentication would need to be further addressed.

51. It was suggested that a convention on enforcement of settlement agreements could either provide for the enforcement of the agreement itself, or for the enforcement of an instrument that would be issued by a competent authority.

52. It was mentioned that the advantage of the first option was that it provided for a simple and straightforward solution. However, it was said that some formal requirements would need to be met in order for an agreement to be enforceable in another State (for example, the obligation stipulated in the agreement should be capable of being enforced in that State and the conciliation procedure complied with due process). It was pointed out that a convention should set out the minimum requirement that a settlement agreement would need to meet to be enforceable.

53. In that light, it was said that the second option would give international legal effect to domestic enforcement procedures, thereby streamlining the cross-border enforcement procedure, although requiring formal actions in several jurisdictions. It was mentioned that under that option, the court where enforcement would be sought would undertake limited review of the settlement agreement.

54. However, it was pointed out that a number of questions would need to be addressed under that option such as which jurisdiction would be competent to review the settlement agreement in the first place for it to be enforced abroad and whether a minimum standard should be established to give international effect to domestic enforcement procedures. In addition, it was suggested that for those States that gave effect to a settlement agreement in the form of a judgement, the recognition and enforcement could take place under the law governing the recognition and enforcement of foreign judgements, and would not fall under the scope of a convention on enforcement of settlement agreements. Similarly, if a settlement agreement had been notarized for the purpose of enforcement, cross-border enforcement might then proceed on the basis of existing multilateral or bilateral conventions.

55. It was suggested that a convention on enforcement of settlement agreements could include a combination of the two options mentioned above (see above, para. 51). It was also mentioned that if a convention were to be prepared, it should provide States some flexibility to make declarations or reservations.

Other possible forms of work

56. Views were expressed that there was not sufficient information to embark on the preparation of a convention. It was suggested that guidelines or model provisions could be developed to assist States, as it would preserve the flexibility of conciliation. It was further said that not all States had developed legislation to address enforcement of settlement agreement and that the preparation of a convention was premature. Therefore, it was suggested that a cautious approach should be adopted.

D. Recommendation to the Commission

57. The Working Group recalled the request by the Commission to consider the issue of enforcement of settlement agreements resulting from international commercial conciliation proceedings and to report on the feasibility and possible form of work in that area (see above, para. 2). The Working Group further recalled that when UNCITRAL prepared the Model Law on Conciliation, the Commission was generally in agreement with the policy that easy and fast enforcement of settlement agreements should be promoted (see para. 88 of the UNCITRAL Guide to Enactment and Use of the Model Law).

58. Questions and concerns were expressed during the deliberation, but it was generally felt that they could be addressed through further work on the topic.

59. After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns.

V. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

60. The Working Group commenced its consideration of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (the “draft revised Notes”) as contained in paragraph 6 of document A/CN.9/WG.II/WP.186. The Working Group noted that the draft revised Notes had been prepared to update the Notes reflecting the decisions of the Working Group at its sixty-first session (see A/CN.9/826).

A. Introduction

61. In relation to paragraph 1 of the draft revised Notes, it was agreed that the word “application” in the second sentence was not appropriate as the Notes were intended to be an instrument for use by arbitration practitioners and not an instrument that would regulate arbitral proceedings.

62. It was agreed that the last sentence of paragraph 3 of the draft revised Notes, which indicated the appropriate time when the arbitral tribunal should bring matters to the attention of the parties, should be revised along the following lines: “..., it is be advisable not to raise a matter prematurely, i.e. before it is clear that the issue need to be addressed”.

63. In relation to paragraph 6 of the draft revised Notes, it was suggested that the words “laws governing the arbitral procedure” should be replaced by the words

"applicable arbitration laws" or "laws applicable to arbitration" as the reference to laws governing arbitral procedure was too limited. The Working Group agreed that similar revisions should be made throughout the draft revised Notes. While noting the need to stress the "fair" and "efficient" nature of the arbitration process, it was suggested that repeating those words in paragraph 6 should be avoided.

64. It was agreed that the first sentence of paragraph 7 of the draft revised Notes should be recast to better reflect the hierarchy of norms that might limit the discretion of the arbitral tribunal, with the applicable arbitration law listed first.

65. It was suggested that the draft revised Notes should address the need for the arbitral tribunal to draw the attention of the parties to the wide range of laws that might be applicable during the course of the arbitral proceedings. While there was general support for that suggestion, the need for the arbitral tribunal to remain impartial in drawing the attention of the parties to that matter was stressed.

66. In relation to paragraph 8 of the draft revised Notes, the Working Group agreed that the usefulness of preparing a procedural timetable could be mentioned. In that context, it was further agreed that references could be made to the procedural arrangements agreed by the parties and the arbitral tribunal.

67. In relation to paragraph 9 of the draft revised Notes, it was agreed that the words "pre-hearing review" could be deleted as that term was not commonly used. While a suggestion was made that the words "preliminary meeting" could also be deleted, it was agreed that they should be retained as a generic term to be used jointly with the term "case management conference". It was further agreed that the draft revised Notes should make consistent use of those terms. The Working Group also agreed that the usefulness of having the parties' representatives present at those meetings should be highlighted.

68. It was further agreed that paragraph 9 should clarify that in the event of non-participation of a party to those meetings, the procedural timetable should provide the non-participating party with the opportunity to present its case in the arbitral proceedings.

69. It was agreed that paragraph 10 of the draft revised Notes should be expanded to address the possible forms that "decisions" could take (for example, a procedural order), while underlining the significance of those decisions irrespective of their form. It was also agreed that that paragraph should clarify that decisions could be made not only during but also after the case management conference. The possibility of an oral decision being recorded at a later stage was also mentioned. A suggestion was made that the period in which the procedural arrangement (or "decision") could be revisited should be qualified as the word "later" was too broad.

70. The Working Group also agreed that a sentence along the following lines should be added in paragraph 10: "When modifying procedural arrangements, the arbitral tribunal and the parties may have to take into consideration dispositions which the parties have taken in compliance with those arrangements and avoid creating any unfairness by making such modification".

71. In that context, it was suggested that the draft revised Notes should address the fact that arbitral tribunals might not have the discretion to modify or revisit unilaterally any decision or arrangement which was recorded as an agreement of the parties. It was agreed that the draft revised Notes should address that issue, noting that arbitral tribunals should take caution in relation thereto.

72. A comment was made that the importance of ensuring the efficiency of the arbitral procedure should be reflected in revising paragraphs 10 and 11.

73. It was recalled that paragraph 11 served as a general provision highlighting the importance for arbitral tribunals to consult with parties on questions pertaining to the organization of arbitral proceedings. To clarify that purpose, the Working Group agreed to add a sentence along the following lines: "This is generally the case for most matters addressed in the Notes and therefore normally is treated as a general consideration whenever the arbitral tribunal settles matters of procedure." In that

context, the Working Group agreed to consider deleting references to consultations with the arbitral tribunal or with the parties, where appropriate in the text of the draft revised Notes.

74. As a matter of drafting, the Working Group agreed to delete the word "more" before the word "usual" in the first sentence of paragraph 11, and to add at the end of paragraph 11 the words "and the planning of the arbitrators" to alert the parties of the potential impact their decisions could have on the arbitral tribunal.

75. In relation to paragraph 12 of the draft revised Notes, the Working Group agreed to replace the words "the arbitral tribunal may wish to encourage this practice" by wording along the lines of "the arbitral tribunal may wish to give effect to that manner of cost saving". The Working Group agreed that the benefits of holding in-person meetings should also be mentioned as such meetings sometimes also resulted in cost saving.

B. Draft Notes 1 to 6

1. Set of arbitration rules

76. The Working Group agreed that paragraph 14 of the draft revised Notes should be placed before paragraph 13 in order to highlight the benefits of selecting a set of arbitration rules.

77. In relation to paragraph 13, it was suggested that the power of the arbitral tribunal to determine how the proceedings would be conducted should be "based on", rather than "within the limits" of, the applicable arbitration law. That suggestion did not receive support.

78. It was agreed that paragraph 14 should be revised to better reflect the relation between the various applicable norms. In that context, the Working Group noted that the word "displace" was inappropriate to express the relations between those norms.

79. While a suggestion was made that the draft revised Notes should make reference to other rules or guidelines that might supplement certain sets of arbitration rules (such as those governing emergency arbitrator), it was agreed that reference to general arbitration rules was sufficient. With respect to rules on emergency arbitrator, it was mentioned that the draft revised Notes presupposed that the arbitral tribunal was in place and therefore, reference to such rules would not be relevant.

2. Language or languages of proceedings

80. It was agreed that the last sentence of paragraph 16 of the draft revised Notes should refer to "criteria" to be considered in choosing the language(s) of the proceedings instead of "a common practice".

81. The Working Group considered the last sentence of paragraph 17 of the draft revised Notes, which provided that if more than one language was to be used, the parties might consider whether one of those languages might be designated as being authoritative. It was suggested to clarify that the choice of an authoritative language would be for the purposes of the procedure only.

82. The Working Group further considered whether the example contained in brackets at the end of paragraph 17 should be limited to awards. During that discussion, it was pointed out that the designation of an authoritative language could impact not only the final award but also other procedural aspects, such as procedural orders. In addition, it was suggested that the bracketed text should make reference to situations where there were more than one language version of an award. After discussion, the Working Group agreed that the bracketed text should be expanded to address those points.

83. The Working Group agreed to add text clarifying that while more than one language could be used during the proceedings, procedural decisions as well as awards could be rendered in one of the languages, if so agreed by the parties.

84. It was agreed that paragraphs 17 and 18 of the draft revised Notes should also be addressed to arbitral tribunals in addition to the parties.

85. The Working Group agreed to replace the words "annexed to the statements of claim and defence or submitted later" in the first sentence of paragraph 19 of the draft revised Notes by words along the lines of "on the record".

86. The Working Group agreed to reflect in paragraph 20 of the draft revised Notes that a witness who would be familiar with the language of the proceedings might still require occasional assistance with interpretation.

3. Place of arbitration

87. The Working Group considered the first sentence of paragraph 22 of the draft revised Notes, which stated that some arbitral institutions required arbitrations conducted pursuant to their rules to take place at the location of the institution. While it was recalled that the 1996 version of the Notes included such text, it did not reflect the current trend whereby institutions generally permitted arbitrations conducted pursuant to their rules to take place at a location which might differ from the place where the institution was located. Despite that general trend, references were made to instances where institutions still required the place of arbitration to be at a specific location (for example, in the field of commodities arbitration and in certain sets of investment arbitration rules).

88. Taking into account the general trend, the Working Group agreed to delete the words "subject to the requirement … of the institution" in the first sentence of paragraph 22. In support of that decision, it was said that the word "usually" in that sentence sufficiently expressed the fact that there might still be exceptions to that general trend.

89. The Working Group agreed that the words "if it has not already been agreed" at the end of paragraph 22 should be deleted as they were redundant.

90. The Working Group agreed that paragraph 23 of the draft revised Notes should clarify that the place of arbitration would normally determine the applicable arbitration law and indicate the various legal consequence that followed as mentioned in the first sentence of paragraph 23.

91. In relation to paragraph 24 of the draft revised Notes, the Working Group agreed that the words "and other relevant matters" should be added after the words "arbitral procedure" under subsection (iv).

92. It was agreed that reference should be made to the "place" of arbitration instead of "seat" in paragraph 25 of the draft revised Notes and other parts of the draft revised Notes, where applicable.

93. The Working Group considered whether the factors listed in paragraph 25 were factors influencing the choice of the legal place of arbitration or the physical venue of the arbitral proceedings.

94. The Working Group agreed to replace the word "will" by "may" and to delete the word "especially" in paragraph 25. It was also agreed that qualification restrictions in certain States with respect to counsels should be added to the list of factors in paragraph 25.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

95. The Working Group agreed that the last sentence of paragraph 30 of the draft revised Notes should clarify that where a secretary was appointed by the arbitral tribunal, the arbitral tribunal ought to disclose that fact to the parties. Therefore, it was agreed that the word "may" in the last sentence of paragraph 30 should be replaced by the words "would normally".

96. The Working Group further agreed that the reference to the "rapporteur" in paragraph 30 of the draft revised Notes should be deleted, as a rapporteur would usually not have the same functions as a secretary.

97. In relation to paragraph 30, attention was drawn to the last sentence of that paragraph, which referred to certain conditions in relation to the appointment of secretaries including their remuneration. In that context, it was pointed out that certain rules or guidelines that addressed appointment of secretaries provided modalities different from those provided in paragraph 30, for instance, in relation to the permissibility of remuneration. In response, it was pointed out that the last sentence of paragraph 31 sufficiently covered that point.

98. In relation to paragraph 31 of the draft revised Notes, it was said that the functions performed by secretaries were broad in range. It was suggested that paragraph 31 could be restructured to better reflect the different categories of function performed by secretaries, (i) providing purely organizational support, (ii) carrying out more substantive functions (for example, preparation of the facts of the award or the procedural history of the arbitral proceedings in addition to those mentioned in the bracketed text following the second sentence of paragraph 31), and (iii) performing other functions similar to those of the arbitral tribunal. With respect to the last category, the Working Group affirmed that secretaries would normally not be expected to perform decision-making or any other functions that the parties would expect the arbitral tribunal to perform.

99. It was said that the first sentence of paragraph 31 sufficiently described the purely organizational type of functions that secretaries might perform. However, doubts were expressed as to whether such a reference was necessary in the draft revised Notes, as parties to an arbitration would usually not require information about the persons carrying out those functions. In response, it was suggested that information about secretaries that performed those functions should be disclosed to the parties and that those secretaries would also be required to sign a declaration of impartiality, because they might have access to certain information. However, it was generally felt that the draft revised Notes should not provide overly complex guidance and that the matter of confidentiality was dealt separately in the draft revised Notes. It was agreed that the first sentence of paragraph 31 could be retained in its current form.

100. Regarding the more substantive type of functions carried out by the secretaries, a number of suggestions were made. It was generally agreed that information about the secretaries and the functions they performed should be disclosed to the parties, particularly when the functions of those secretaries were broad in scope. A suggestion was made that the words "or overlap" should be deleted from the third sentence of paragraph 31. It was further suggested that the first part of the fourth sentence of paragraph 31 could read along the following lines: "Such a role of the secretary is appropriate only under certain conditions, such as when …". It was also mentioned that there was no need to retain the words "such role is disclosed" as that point was sufficiently covered by the requirement that parties agree to such role.

101. With respect to the requirement for secretaries to sign a declaration of impartiality as mentioned in the fourth sentence of paragraph 31, it was suggested that secretaries should be required to sign a declaration that would also include independence. Concerns were expressed that requiring a declaration of impartiality could give the wrong impression that those secretaries would indeed be involved in the decision-making process.

102. After discussion, it was agreed that the draft revised Notes should state that the secretaries were expected to be and remain impartial and independent during the arbitral proceedings and that it would be the responsibility of the arbitral tribunal to ensure this, including by requesting the secretaries to sign a declaration of independence and impartiality. It was also agreed that the draft revised Notes would recognize that there were certain instances whereby secretaries might be required to sign a declaration of independence and impartiality. A concern was raised that such declaration might result in challenges to secretaries.

5. Fees, costs and deposits in respect of costs

103. It was noted that paragraph 32 of the draft revised Notes contained the principle that the costs of the arbitration would normally be borne by the unsuccessful party. It was agreed that paragraph 32 should spell out other possible criteria to apportion costs between the parties, including sharing of costs by parties irrespective of the outcome on the merits or by any other agreement between the parties. It was suggested that the legal environment at the place of arbitration could also be a factor influencing the allocation of costs.

104. Furthermore, it was agreed that paragraph 32 should be broadened to include other elements that the arbitral tribunal would consider in determining the allocation of costs, particularly those mentioned in paragraph 35.

105. In relation to paragraph 34 of the draft revised Notes, it was mentioned that decisions on costs would not have to be linked to the final award on merits and could be made at various stages of the proceedings. With respect to when submission on costs would be required, it was agreed that paragraph 34 should mention that the arbitral tribunal had the discretion to request such submissions, when appropriate. Moreover, it was agreed that paragraph 34 should be revised to take account of situations where arbitral proceedings would be terminated without a final award being rendered. In that respect, it was agreed to delete the words "the possibilities being before or after … on the merits" in the last sentence of paragraph 34.

106. It was agreed that paragraph 35 of the draft revised Notes should list the factors to be considered by the arbitral tribunal when allocating costs instead of making a reference to guidance or rules of certain arbitral institutions. It was further agreed that those factors should be considered only for the purposes of costs allocation and not as a means of penalizing parties for their behaviour. In that context, it was suggested that the draft revised Notes should indicate that the arbitral tribunal would not normally take into consideration the behaviour of the parties unless it had an actual impact on the costs of the proceedings.

107. In that context, it was agreed that the words "unreasonable", "excessive" and "exaggerated" should be deleted and the examples in paragraph 35 should be presented in a neutral, generic manner (for example, referring to cooperation or non-cooperation of the parties). It was also suggested that "failure to comply with procedural orders" could cause additional costs and therefore, should be taken into account.

108. In relation to the reference to "value-added tax" in paragraph 37 of the draft revised Notes, the Working Group considered whether other types of taxes (for example, income tax) should be mentioned. After discussion, it was agreed that while reference to "value-added tax" could be retained, reference to other types of taxes would not be added as it would generally complicate the text without providing much guidance.

109. During that discussion, it was suggested that the items listed in the second sentence of paragraph 37 would be better placed in the subsection on fees and costs. Suggestions were made to clarify that deposits could be paid in full or in instalments, and that bank guarantees could be a means to make such deposits.

110. In relation to paragraph 39 of the draft revised Notes, the Working Group agreed to include a provision whereby if an institution did not offer the services of managing deposits, the parties or the arbitral tribunal would have to make the necessary arrangements, for instance with a bank or other external provider. In addition, it was agreed to delete the word "payable" at the end of paragraph 38, and to replace it by the words "on the deposit".

111. Differing views were expressed with regard to the words "international sanctions" in paragraph 39 which would limit the arbitral tribunal's ability to manage payments and deposits. One suggestion was to broaden the wording by adding "restrictions", while another was to delete the reference altogether. Yet another suggestion was that sanctions should be limited to those put in place by international

organizations thus excluding sanctions by a State or group of States. After discussion, it was agreed that the words "international sanctions" should be replaced by the words "any restriction on trade or payment".

112. The Working Group agreed that paragraph 40 of the draft revised Notes should be placed after paragraph 37 as it addressed a similar issue.

Interim measures

113. It was agreed that the draft revised Notes should include a separate section on interim measures, possibly before the section on "arrangements for the exchange of written submissions". It was generally felt that the new section should not be prescriptive and need not touch upon the various types of interim measures. It was agreed that that section could address the following aspects: (i) most applicable arbitration rules and arbitration law allowed arbitral tribunals to grant interim measures; (ii) normally an expedited process was provided for interim measures; (iii) enforcement of an interim measure was not always assured; (iv) the arbitral proceedings would continue, even if a party requested an interim measures from a domestic court; and (v) cost and security in connection with interim measures (addressed in the draft revised Notes in paragraph 36).

6. Confidentiality of information relating to arbitration: possible agreement thereon

114. The Working Group agreed that paragraph 43 of the draft revised Notes, which dealt with a situation where the parties had not previously agreed on confidentiality, should read along the following lines: "Should confidentiality be a [concern][priority], parties may wish to agree to record a duty of confidentiality in the form of an agreement." While support was expressed for retaining the words "in consultation with the arbitral tribunal" after the words "wish to agree", it was generally felt that those words were not necessary.

115. It was agreed that paragraph 44 of the draft revised Notes should include a reference to the confidentiality obligations of experts and witnesses.

116. In relation to the second sentence of paragraph 45 of the draft revised Notes, it was suggested that an "arrangement" need not necessarily be made by the arbitral tribunal and could be agreed by the parties themselves. It was also mentioned that such an arrangement would generally restrict access to certain information rather than limit disclosure. To address those concerns, it was agreed that the second sentence of paragraph 45 should be revised to read: "Arrangements may be made by the parties and, in certain circumstances, by the arbitral tribunal in respect of that information, for example, by restricting the access to the information to a limited number of designated persons."

117. A suggestion was made that paragraph 47 of the draft revised Notes should not be placed under the section addressing confidentiality of information in commercial arbitration, as its content dealt with transparency in investment arbitration. Therefore, it was stated that paragraph 47 should form a separate section or subsection. In that context, a suggestion was made that the draft revised Notes should make a clear distinction between commercial and investment arbitration. In response, it was recalled that the general approach of the Working Group had been to not distinguish the different types of arbitration in the draft revised Notes so as to provide general guidance.

118. It was generally felt that paragraph 47 adequately addressed the concerns expressed at the sixty-first session of the Working Group that the matter of transparency as it applied to investment arbitration should be highlighted.

119. After discussion, it was agreed that paragraph 47 should be retained in Note 6, while the heading of that Note could be revised in a manner that also highlighted transparency.

120. With respect to footnote 4 contained in paragraph 47 of the draft revised Notes, it was agreed that reference should only be made to UNCITRAL texts on transparency, and article 1(4) of the UNCITRAL Arbitration Rules (as adopted in 2013), with an indication that there were other rules that also provided for transparency.

121. A suggestion that the draft revised Notes should refer to situations where the arbitration agreement or the underlying contract to the dispute included provisions on confidentiality did not receive support.

C. Draft Notes 7 to 19

122. Before the close of its session, the Working Group heard suggestions with respect to the remaining parts of the draft revised Notes without any deliberation.

Heading of Note 7

123. It was suggested that the word "electronic" be replaced by the word "technological" in the heading of Note 7.

Paragraph 52

124. It was suggested that direct communication between the arbitral tribunal and the parties should be recommended and not merely recognized as a usual practice in paragraph 52.

Paragraph 53

125. It was suggested that paragraph 53 should be revised to include a reference to the procedural timetable that the parties ought to follow.

Paragraph 62

126. It was suggested that paragraph 62 should be revised to reflect more positively the possibility of amicable settlements during arbitral proceedings. It was further suggested that the words "outside the context of the arbitration" in the first sentence and the word "many" in the second sentence should be deleted. It was further suggested that paragraph 62 could provide that where it was possible for the arbitral tribunal to raise the possibility of an amicable settlement, it could, if so requested by the parties, guide or assist the parties in their negotiations. In that connection, a suggestion was made that the words "due caution and restraint" could be deleted.

Paragraph 66

127. It was suggested that reference should be made to applicable law in the last sentence of paragraph 66.

Paragraph 67

128. It was suggested that the word "conclusions" in paragraph 67 should be replaced by the word "inferences".

Paragraph 70

129. It was suggested that paragraph 70 should include a reference to paragraph 56.

Note 13

130. It was suggested that Note 13 should address the consequences of non-appearance of witnesses.

Paragraph 73

131. It was suggested that paragraph 73 should mirror paragraph 81 and include guidance on contacts with the witnesses in the context of written statements.

Paragraph 76

132. It was suggested that paragraph 76 could set out the general practice of the order in which witnesses were examined.

Paragraph 77

133. It was suggested that the last sentence of paragraph 77 should state that when a written statement was submitted, an oral testimony would usually be limited to confirming, summarizing and updating the written statement.

Paragraph 79

134. It was suggested that paragraph 79 should better reflect the diversity in laws and practices with regard to whether a representative of a party could testify as a witness and remain in the hearing room after having testified as a witness.

Paragraph 80

135. It was suggested that a reference should be made to the practice with respect to the order in which witnesses could be heard (for instance, to hear first the witnesses presented by the claimant, followed by those presented by the defendant).

Paragraphs 85 to 95

136. It was suggested that the following could be included in the draft revised Notes: (i) when one or more parties were presenting an expert opinion, it would be advisable for the arbitral tribunal to consult with experts before the preparation of the report; (ii) it would be advisable for the arbitral tribunal to first identify the issues before deciding whether to appoint an expert; (iii) additional information could be provided on the practice of appointing a single joint expert; and (iv) the terms of reference should clearly indicate the expertise required of the expert.

Paragraph 101

137. It was suggested that paragraph 101 was too prescriptive and therefore, should be revised to leave the possibility open for statements made during in-site visits to be treated as evidence in the proceedings.

Paragraph 112

138. It was suggested that paragraph 112 should underline the advisability to consult with the parties on the need for post-hearing submissions. It was also mentioned that arbitral tribunals would usually determine before or during the hearing whether such submissions were necessary.

Paragraph 113

139. It was suggested that paragraph 113 should include the possibility of deliberations taking place before and also “shortly” after the hearings.

Paragraph 115

140. It was stated that while it was true that joinders were more frequent, it would be questionable if that was a result of developments in multiparty transactions. It was also mentioned that not all joinders required the contemporaneous consent of third parties joined as they might already be party to the arbitration agreement.

Additional issues

141. It was suggested that the draft revised Notes could include a provision on the usefulness of including a section on procedural history in the award, particularly to deal with cases where there was a non-participating party.

142. While a suggestion was made that the draft revised Notes should also address circumstances arising after the award, it was generally felt that that was outside the scope of the draft revised Notes.

E. Note by the Secretariat on settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation

(A/CN.9/ WG.II/WP.187)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session (New York, 7-18 July 2014), the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[1]

2. At that session, the Commission had before it a proposal on enforcement of settlement agreements resulting from international commercial conciliation (A/CN.9/822). In support of that proposal, it was said that one obstacle to greater use of conciliation was that settlement agreements reached through conciliation might be more difficult to enforce than arbitral awards. In general, it was said that settlement agreements reached through conciliation are already enforceable as contracts between the parties but that enforcement under contract law cross-border can be burdensome and time-consuming. Finally, it was said that the lack of easy enforceability of such contracts was a disincentive to commercial parties to mediate. Consequently, it was proposed that the Working Group develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") had facilitated the growth of arbitration.[2]

3. Support was expressed for possible work in that area on many of the bases expressed above. Doubts were also expressed as to the feasibility of the project and questions were raised in relation to that possible topic of work, including: (a) whether the new regime of enforcement envisaged would be optional in nature; (b) whether the New York Convention was the appropriate model for work in relation to mediated settlement agreements; (c) whether formalizing enforcement of settlement agreements would in fact diminish the value of mediation as resulting in contractual agreements; (d) whether complex contracts arising out of mediation were suitable for enforcement under such a proposed treaty; (e) whether other means of converting

[1] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 129.

[2] Ibid., para. 123.

mediated settlement agreements into binding awards obviated the need for such a treaty; and (f) what the legal implications for a regime akin to the New York Convention in the field of mediation might be.[3]

4. It was furthermore observed that UNICTRAL had previously considered that issue when preparing the UNCITRAL Model Law on International Commercial Conciliation (2002) ("Model Law on Conciliation" or "Model Law"),[4] and particular reference was made to article 14 of the Model Law and paragraphs 90 and 91 of the Guide to Enactment and Use[5] of that text.[6]

5. Previous discussions on the question of enforcement of settlement agreements resulting from conciliation may be found in the following documents published by UNCITRAL:

- Notes by the Secretariat: A/CN.9/460, paragraphs 16-18; A/CN.9/WG.II/WP.108, paragraphs 34-42; A/CN.9/WG.II/WP.110, paragraphs 105-112; A/CN.9/WG.II/WP.113/Add.1, footnote 39; A/CN.9/WG.II/WP.115, paragraphs 45-49; A/CN.9/WG.II/WP.116, paragraphs 66-71; A/CN.9/514, paragraphs 77-81.
- Reports of the Working Group on Arbitration: thirty-second session (A/CN.9/468, paras. 38-40); thirty-fourth session (A/CN.9/487, paras. 153-159); thirty-fifth session (A/CN.9/506, paras. 38-48; 133-139; 160 and 161).
- Report of the thirty-fifth session of the Commission: *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), paragraphs 119-126 and 172.

6. To facilitate discussions of the Working Group on that topic, the present note contains background information on previous consideration by UNCITRAL of the topic, a presentation of existing legislative solutions and questions underlying possible harmonized solutions.

II. Enforceability of settlement agreements resulting from international commercial conciliation/mediation[7]

A. General remarks

7. UNCITRAL previously developed two important instruments aimed at harmonizing international commercial conciliation: the Conciliation Rules (1980) and the Model Law on Conciliation (2002), which form the basis of an international framework for conciliation.[8] The Conciliation Rules were the first international step taken in harmonizing that field. When adopting the Model Law on Conciliation, the Commission endorsed "the general policy that easy and fast enforcement of settlement agreements should be promoted".[9] The United Nations General Assembly recognized that the use of conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and

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[3] Ibid., para. 124.

[4] *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex I.

[5] Ibid., annex II.

[6] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 125.

[7] The terms "mediation" and "conciliation" are used interchangeably in that note, as broad notions referring 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 (see article 1(3) of the Model Law on Conciliation and para. 5 of its Guide to Enactment and Use).

[8] Legislation based on the Model Law on International Commercial Conciliation has been enacted in Albania, Belgium, Canada (Nova Scotia and Ontario), Croatia, France, Honduras, Hungary, Luxembourg, Montenegro, Nicaragua, Slovenia, Switzerland, Turkey and United States of America (District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington).

[9] Guide to enactment of the Model Law on International Commercial Conciliation, para. 88.

producing savings in the administration of justice by States."[10] Enforcement of settlement agreements is often cited as one crucial aspect that would make mediation a more efficient tool for resolving disputes.

Background information on work done by UNCITRAL on the topic

8. The Working Group considered the question of enforcement of settlement agreements at its thirty-second (Vienna, 20-31 March 2000) to thirty-fifth (Vienna, 19-30 November 2001) sessions, when it prepared the Model Law on Conciliation. The Working Group discussed whether, because of the diversity of legislative approaches as summarized in document A/CN.9/WG.II/WP.110, paragraphs 106-111, it would be desirable and feasible to prepare a uniform model provision on enforcement of settlement agreements that would be universally acceptable and, if so, what the substance of the uniform rule should be.

9. The Working Group considered model legislative provisions as a vehicle for harmonization and did not discuss at that time the preparation of a treaty. The various options envisaged in its deliberations on article 14 ("Enforcement of settlement agreements") of the Model Law on Conciliation were as follows.

10. One option considered by the Working Group was to provide that a settlement agreement should be dealt with as a contract. That solution was not retained because it was considered that a more effective enforcement regime should be established, through which a settlement agreement would be accorded a higher degree of enforceability than any unspecified contract (A/CN.9/506, para. 40).

11. Another option was to prepare a model legislative provision that would give recognition to a situation where the parties appointed an arbitral tribunal with the specific purpose of issuing an award based on the terms settled upon by the parties. Such an award, envisaged in article 30 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration"), would be capable of enforcement as any arbitral award. That option was also rejected as it was considered inappropriate for a model legislative provision to suggest in a general manner that all conciliation proceedings leading to a settlement agreement should result in the appointment of an arbitral tribunal.[11]

12. More generally, it was considered that uncertainties might arise from the interplay of the two legal regimes that might be applicable, namely the general law of contracts and the legal regime governing arbitral awards. For example, as to the reasons that might be invoked for challenging the binding and enforceable character of a settlement agreement, it was stated that the grounds listed in article V of the New York Convention and in article 36 of the Model Law on Arbitration for refusing enforcement, as well as the grounds listed under article 34 of that Model Law for setting aside an arbitral award, might be insufficient or inappropriate to deal with circumstances such as fraud, mistake, duress or any other grounds on which the validity of a contract might be challenged (A/CN.9/506, para. 43).

13. Yet, another suggestion was that the legal regime of notarized acts in certain countries might constitute a useful model. It was pointed out, however, that such a model might require the establishment of form requirement for settlement agreements, thus introducing a level of formalism that could contradict existing conciliation practice.

14. At its thirty-fifth session, in 2002, the Commission adopted the following version of the relevant provision for inclusion in the Model Law on Conciliation: "Article 14. Enforceability of settlement agreement - If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

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[10] Resolution 57/18 of 19 November 2002.

[11] See also, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 121.

15. That model legislative provision states the principle that settlement agreements are enforceable, without attempting to specify the method by which such settlement agreements may actually be enforced, a matter that is left to each enacting State. It is also noteworthy that the solution adopted does not contain any form requirements. The text adopted in the Model Law does not take a stand on the nature of a settlement agreement. It only expresses that a contractual obligation, "binding" on the parties, is "enforceable" by State courts. In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation.[12] However, States were encouraged to adopt expedited enforcement mechanisms or simplified procedures.

Statistics and data on conciliation and enforcement of settlement agreements

16. The use of conciliation for settling commercial disputes has increased considerably since the adoption of the UNCITRAL Conciliation Rules in 1980. Legislation on conciliation has been enacted in a growing number of jurisdictions;[13] conciliation and mediation institutes have proliferated, as well as specific training for conciliators or mediators.

17. A project led by the World Bank on "Investing Across Borders (IAB)" collected data on mediation and/or conciliation laws and centres.[14] The project provides an overview of the framework on mediation, without focussing on the question of enforcement of settlement agreements. A brief summary of the main findings of the project is reproduced in an annex to this note in the form in which it was received by the Secretariat from the World Bank.

18. The use of conciliation/mediation varies greatly depending on jurisdictions. For instance, in the European Union ("EU"), a recent study showed that one country has a reported number of mediation cases exceeding 200,000 annually, the next three countries exceeded 10,000, while a significant number of EU Member States reported less than 500 mediation cases per year. The study also suggests that if enforcement of settlement agreements were uniform, mediation would become more attractive, in particular, in the international business sector. Uniformity would also limit the likelihood of forum shopping among parties.[15]

19. The Working Group may wish to note that, save for recent surveys,[16] there were no reported or available consolidated studies on the specific question of enforcement of settlement agreements by State courts.

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[12] UNCITRAL Model Law on International Commercial Conciliation, Guide to Enactment and Use, para. 88.

[13] Policy Research Working Paper, Arbitrating and Mediating Disputes, Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment, The World Bank, Financial and Private sector Development Network, Global Indicators and Analysis Department, October 2013, at p. 9.

[14] World Bank Group, International Finance Corporation, Investing Across Borders available on 26 November 2014 on the Internet at http://iab.worldbank.org/data/fdi-2012-data.

[15] European Parliament, Directorate-General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, "Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU".

[16] The Working Group may wish to note the publication of a recent survey, titled "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed Convention on International Commercial Mediation and Conciliation", available on 26 November 2014 on the Internet at http://ssrn.com/abstract=2526302; the International Mediation Institute has also published a survey, titled "How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements", available on 26 November 2014 on the Internet at http://imimediation.org/un-convention-on-mediation.

B. Current legislative trends

20. In August 2014, the Secretariat has circulated to States a questionnaire on the legislative framework on enforcement of international settlement agreements resulting from mediation. The questionnaire aimed at collecting information on whether States have already adopted legislation addressing enforcement of settlement agreements, and in particular, (i) whether expedited procedures were already in place; (ii) whether a settlement agreement could be treated as an award on agreed terms; (iii) the grounds for refusing enforcement of a settlement agreement; and (iv) the criteria to be met for a settlement agreement to be deemed valid. It also included questions on the validity of an agreement to refer a dispute to mediation. The replies received by the Secretariat will be published in advance of the forty-eighth session of the Commission, in 2015. They reflect the fact that legislative solutions regarding the enforcement of settlements reached in conciliation proceedings differ widely.

Contractual nature of a settlement agreement in some States

21. Some States have no special provisions on the enforceability of such settlements, with the result that general contract law applies.

Court enforcement

22. Other States provide for enforcement of settlement agreements as court judgements, where a settlement agreement approved by a court is deemed an order of the relevant court and may be enforced accordingly. Such procedure may or may not include specific expedited enforcement mechanisms. For instance, in some jurisdictions, a settlement agreement can be enforced in a summary fashion, provided that the settlement is signed by the mediator or by legal counsel representing the parties, and that the settlement agreement contains a statement expressing the parties' intent to seek summary enforcement of the agreement. Other jurisdictions opted for the method of deposition or registration at the court as a way to make a settlement agreement enforceable.

23. The status of an agreement reached following conciliation sometimes depends on whether or not the conciliation took place within the court system as a legal proceeding. It is also worth noting that, in some jurisdictions, the situation may differ depending on whether the settlement agreement is reached through mediation by a qualified arbitrator. For instance, in one jurisdiction, a mediated settlement agreement reached before a mediator who is a qualified arbitrator has the same force and effect as that of an award on agreed terms.

24. The practice of requesting a notary public to notarize the settlement agreement is adopted by a number of jurisdictions as a means of enforcement.

25. It may be noted that, in some jurisdictions, if a settlement agreement has been confirmed by a court decision in a foreign State, such decision can then be recognized and enforced under the law governing the recognition and enforcement of foreign judgments. Similarly, if a settlement agreement has been notarized for the purpose of enforcement, cross-border enforcement may then proceed on the basis of existing multilateral or bilateral conventions.

Award on agreed terms

26. The law in certain jurisdictions empowers parties who have settled a dispute to appoint an arbitral tribunal for the specific purpose of issuing an award on agreed terms based on the agreement of the parties. After having reached an agreement in the course of the conciliation proceedings, the parties could at the same time establish an ad hoc arbitration and appoint the conciliator as a sole arbitrator. In that case the

parties are able to transform their settlement agreement into an arbitral award for enforcement purposes.[17] That practice is prohibited in certain jurisdictions.

Combination of various means for enforcement

27. It is also worth noting that certain States tend to combine various means in order to make a settlement agreement enforceable (such as to permit that the settlement agreement be (i) filed for enforcement as a contract or as an arbitral award, or (ii) transposed in the form of either a notarial deed for enforcement, or a specific court order).

Grounds for refusing enforcement

28. The grounds for refusing enforcement of a settlement agreement vary depending on the means chosen for enforcement. They would be similar to grounds for refusing enforcement of court decisions when the settlement agreement is given the status of a judgment, and would include, for example, public policy, a jurisdictional test and lack of due process. When contract law principles apply, the grounds for challenging the validity of a settlement agreement would include, for example, consideration of the capacity of the parties, and whether the agreement was procured by misrepresentation, duress or undue influence.

Assessment of the validity of an agreement to refer a dispute to mediation

29. In general, the validity of an agreement to refer a dispute to mediation is assessed in accordance with applicable provisions of contract law.

Final remarks

30. As briefly outlined above, the Working Group may wish to note that national legislation is diverse, and no dominant trend can be identified. It is noteworthy that States tend to adopt legislation on mediation, and to provide various solutions for enforcement of settlement agreements. The diversity of approaches toward the objective of enforcing settlement agreement might militate in favour of considering whether harmonization of the field would be timely.

C. Questions underlying possible harmonized solutions

31. At the forty-seventh session of the Commission, a proposal ("Proposal") for undertaking the preparation of a convention on enforcement of settlement agreements resulting from mediation was made on the basis that a convention, modelled on the New York Convention, would draw upon the approach taken by a number of jurisdictions that make conciliated settlement agreements easier to enforce by treating them in the same manner as arbitral awards (see above, paras. 1 to 3). It was explained by its proponents that such a convention would address the enforceability of settlement agreements directly, rather than relying on the legal fiction of deeming them to be arbitral awards. It was further explained that that approach would also eliminate the need to initiate an arbitration process (with the attendant time and costs) simply to incorporate a settlement agreement into an award.[18]

32. Questions that the Working Group may wish to address, that were raised during the session of the Commission in respect of the Proposal, are as follows:[19]

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[17] Certain organizations allow mediated settlement agreements to be treated as arbitral awards for the purpose of enforcement (for instance, the Singapore Mediation Centre and the Singapore International Arbitration Centre (SMC-SIAC Med Arb Services), the Stockholm Chamber of Commerce (article 14 of the rules of the Swedish Mediation Institute), article 11 of the International Commercial Mediation Rules of the Japan Commercial Arbitration Association).

[18] A/CN.9/822, at p. 3.

[19] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 124.

- *On the principle of preparing a convention on enforcement of settlement agreements resulting from international commercial mediation*

(a) Whether formalizing enforcement of settlement agreements might have the unintended effect of diminishing the value of mediation as resulting in contractual agreements, since mediation is characterized by its flexibility;

(b) Whether complex contracts arising out of mediation, or settlement agreements providing for in-kind compensation were suitable for enforcement under the proposed convention;

(c) Whether other means of converting mediated settlement agreements into binding awards would obviate the need for such a convention.

- *On the modalities*

(d) Whether the envisaged new regime of enforcement would be optional in nature; the Working Group may wish to consider that question in light of existing legislation and enforcement mechanisms, taking into account that the legal enforcement process may differ depending on whether the settlement agreement is embodied in a consent award, a judgment or a contract;

(e) Whether the New York Convention is the appropriate model for work in relation to mediated settlement agreements and what the legal implications for a regime akin to the New York Convention in the field of mediation might be.

- *On the content of such a convention*

33. If the Working Group considers that preparing a convention on enforcement of settlement agreements resulting from mediation is a desirable way forward, it may wish to note that the Proposal highlighted that a convention should apply to "international" settlement agreements, resolving "commercial" disputes, as opposed to other types of disputes (such as employment law or family law matters, and agreements involving consumers). Such limitations to the scope of the proposed convention are likely to reinforce its acceptability.

34. The Proposal further suggested that the convention should provide (i) certainty regarding the form of covered settlement agreements, for example, agreements in writing, signed by the parties and the conciliator; and (ii) flexibility for each party to the convention to declare to what extent the convention would apply to settlement agreements involving a government. The Proposal further stated that the convention would provide that settlement agreements falling within its scope are binding and enforceable (similar to Article III of the New York Convention), subject to certain limited exceptions (similar to Article V of the New York Convention).[20] The Working Group may wish to consider the following questions in relation to the Proposal, as follows:

(a) Regarding the settlement agreements covered by the proposed convention, the Working group may wish to consider (i) whether there should be a distinction depending on whether or not the settlement agreement came out of a process in which a third-party intermediary assisted with the settlement; and if there is such a distinction, how to avoid too formalistic an approach (such as requiring that the settlement agreement bears certain mentions, or is signed by mediators or parties' counsels); moreover, whether or to what extent, such third-party have to fulfil certain qualifications; and (ii) how to address enforcement of settlement agreements that are conditional on certain future events or future conditions being met (it may be noted in relation to this last point that the Proposal includes a question on whether limits on enforcement under the convention would be appropriate in such cases);[21]

(b) Regarding the grounds for refusing enforcement, if those listed in the proposed convention include grounds found in contract law to challenge the validity of a settlement agreement, then the Working Group may wish to consider questions

[20] A/CN.9/822, at p. 3.
[21] A/CN.9/822, at p. 5.

such as the extent of court review under the proposed convention, and the benefit of such a convention compared to existing expedited enforcement mechanisms;

(c) Other matters for consideration at this stage may include whether (i) and, in the affirmative, how the proposed convention should address possible subsequent procedure on rectification if unforeseen circumstances arise in the course of enforcement; and (ii) whether certain claims should be excluded from its scope;

(d) Whether further methods of harmonization in the field of enforcing settlement agreements may also include model legislative provisions, eventually coupled with model contractual provisions; as well as preparation of a recommendation on the application of the New York Convention to consent awards rendered by an arbitrator appointed following a mediated settlement agreement. Indeed, the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties; the travaux préparatoires of the New York Convention show that the issue of the application of the Convention to consent awards was raised, but not decided upon;[22] reported case law does not address this issue.[23]

[22] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, at 7, 10; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.26. See also *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration, Consolidated Report by the Secretary-General, E/CONF.26/4, at 26.

[23] UNCITRAL Secretariat Guide on the New York Convention, Article I, para. 37, available on the Internet at www.newyorkconvention1958.org.

Annex 1

World Bank mediation and conciliation data note

The 2012 World Bank Group's **Investing Across Borders (IAB)**[24] Project collected data relating to mediation and/or conciliation through a standard questionnaire that was administered with arbitration, mediation and conciliation experts in 100 economies, including lawyers, law professors, arbitrators, members of arbitration and mediation institutions, and government regulators, on a pro-bono basis. The questionnaire was distributed in late 2011, with responses received through mid-2012.

Table 1 shows the 100 economies across 7 regions which were surveyed.

Table 1: AMD indicators coverage:

East Asia and the Pacific 11 economies	Brunei Darussalam; Cambodia; Hong Kong SAR, China; Indonesia; Malaysia; Papua New Guinea; Philippines; Singapore; Taiwan, China; Thailand; Viet Nam
Eastern Europe and Central Asia 21 economies	Albania; Armenia; Azerbaijan; Belarus; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Georgia; Kazakhstan; Kosovo; Kyrgyz Republic; Macedonia, FYR; Moldova; Montenegro; Poland; Romania; Russian Federation; Serbia; Turkey; Ukraine
Latin America and the Caribbean 15 economies	Argentina; Bolivia (Plurinational State of); Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Peru; Venezuela (Bolivarian Republic of)
Middle East and North Africa 8 economies	Algeria; Egypt, Arab Rep.; Iraq; Jordan; Morocco; Saudi Arabia; Tunisia; Yemen, Rep.
High income OECD 17 economies	Australia; Austria; Canada; Czech Republic; France; Germany; Greece; Ireland; Italy; Japan; Korea, Rep.; Netherlands; New Zealand; Slovak Republic; Spain; United Kingdom; United States
South Asia 6 economies	Afghanistan; Bangladesh; India; Nepal; Pakistan; Sri Lanka
Sub-Saharan Africa 22 economies	Angola; Burkina Faso; Burundi; Cameroon; Chad; Congo, Dem. Rep.; Côte d'Ivoire; Ethiopia; Ghana; Kenya; Madagascar; Mali; Mauritius; Mozambique; Nigeria; Rwanda; Senegal; Sierra Leone; South Africa; Tanzania; Uganda; Zambia
Source: FDI Regulations Database, 2012	

Methodology:

The surveyed respondents answered the following questions on mediation and conciliation:

- Does your country have a consolidated law encompassing substantially all aspects of commercial mediation or conciliation?
- If yes, please specify if it is relevant to mediation or conciliation or both, and indicate the applicable provision(s) and the years when they were adopted.
- If yes, please specify if it is relevant to mediation or conciliation or both.
- What is the year of enactment?
- If yes, in your view, is that statute based on the language of the UNCITRAL Model Law on International Commercial Conciliation?
- Please describe, if applicable any significant ways in which your national mediation or conciliation statute differs in substance from the UNCITRAL Model Law.
- In commercial disputes where court proceedings have been instituted, do the laws of your country provide for court referrals of cases to mediation or conciliation?
- If yes, please indicate the applicable rules and the year(s) when they were adopted.
- What is the year of enactment?

[24] All data relating to the survey and the indicators used is available at http://iab.worldbank.org/data/fdi-2012-data.

- Please specify for what type of cases and/or in what circumstances.
- Please specify, if relevant, the name of the institution to which such cases are usually referred.
- If possible, please specify what percentage of cases referred to mediation or conciliation is settled.
- Is/are the law(s) on mediation or conciliation available online through a government supported website?
- If yes, please indicate the Internet address of any public institution's website.
- Please indicate the Internet address of any other private websites.

Findings from the survey:

The following represents the main findings based on the answers provided by the surveyed respondents.

Out of court mediation/conciliation:

Out of the 100 economies that were surveyed, 46 economies indicated that they have enacted a law on out of court mediation and/or conciliation. The year of enactment of such law varied between regions. For example in High Income OECD countries, the most recent enactment of a separate mediation and/or conciliation law was in France which was done in 2012 and the oldest being Japan in 1951. On the contrary, in sub-Saharan African countries, only Mauritius (2010), Mozambique (1999), Burkina Faso (2012) and Uganda (2000) have enacted a comprehensive law for mediation and law.

Court referred mediation and/or conciliation:

Out of the 100 economies surveyed it was found that 64 economies did have laws that provide for court referral of cases to mediation or conciliation in commercial disputes where court proceedings have been initiated. Some of these laws narrow the type of cases that may be submitted to mediation or conciliation services under certain conditions. For example, in Colombia, conciliation is a prerequisite before litigation in commercial, family, and administrative law cases. During commercial trials, there is a special preliminary hearing for the purpose of conciliation, in which the judge acts as a conciliator. In addition, according to the 2010-2011 statistics provided by the Colombian Ministry of Justice Website, some 50 per cent of the cases referred to conciliation are settled, highlighting the importance of such practices.

Further, the year of enactment of laws providing the courts to refer cases to mediation and/or conciliation ranged in the surveyed economies. For example 90 per cent of the countries surveyed in the Latin America and Caribbean Region enacted relevant laws in the past 10 years with an exception of Guatemala being the earliest law in 1964. Similarly, in the OECD countries, Japan is the earliest in 1951, along with Slovak Republic in 1963, and France being the most recent in 2011.

Arbitration and mediation institutions:

Around 80 economies out of the 100 economies surveyed indicated that their leading arbitration institutions, also provided mediation and/or conciliation services.

Table 2 below provides the breakdown of the number of economies by region relative to certain findings on mediation and/or conciliation.

Region and number of economies surveyed	Countries that have laws for out of court mediation and/or conciliation (year of enactment)	Countries that have laws for referral of cases to mediation and conciliation (year of enactment)	Countries where the arbitration institutions act as the leading provider for mediation and/or conciliation services
East Asia and the Pacific **11 economies**	Indonesia (1999); Papua New Guinea (2010); Philippines (2004)	Brunei Darussalam (2012); Hong Kong (2010); Indonesia	Cambodia; Hong Kong SAR, China; Indonesia; Malaysia;

Region and number of economies surveyed	Countries that have laws for out of court mediation and/or conciliation (year of enactment)	Countries that have laws for referral of cases to mediation and conciliation (year of enactment)	Countries where the arbitration institutions act as the leading provider for mediation and/or conciliation services
		(2008); Papua New Guinea (2010); Philippines (2011); Singapore (1996 revised in 2006); Taiwan (1935); Thailand (2000 and 2011); Viet Nam (2004 with amendment in 2011)	Philippines; Taiwan, China; Viet Nam
Eastern Europe and Central Asia 21 economies	Albania (2011); Armenia (2008); Belarus (1998); Bosnia and Herzegovina (2004); Bulgaria (2004); Croatia (2011); Kazakhstan (2011); former Yugoslav Republic of Macedonia (2006); Moldova (2007); Montenegro (2005); Poland (2005); Romania (2006); Russian Federation (2010); Serbia (2005)	Belarus (2011); Bosnia and Herzegovina (2003 with amendment in 2006); Bulgaria (2007); Croatia (1977 with several subsequent amendments); Kazakhstan (1999); Kosovo (2008); former Yugoslav Republic of Macedonia (2010); Montenegro (2010); Poland (2005); Romania (2010 mediation; 2000 conciliation); Russian Federation (2002); Serbia (2004)	Albania; Azerbaijan; Belarus; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Georgia; Kazakhstan; Kosovo; former Yugoslav Republic of Macedonia; Moldova; Poland; Romania; Russian Federation; Serbia; Turkey
Latin America and the Caribbean 15 economies	Argentina (2010); Bolivia (1997); Columbia (2001); Costa Rica (1997); Ecuador (1997); Guatemala (1995); Honduras (2000); Mexico (2008); Nicaragua (2005)	Argentina (2010); Bolivia (Plurinational State of) (2011); Chile (1992); Columbia (2010); Dominican Republic (2005); Ecuador (1997); Guatemala (1964); Honduras (2006); Mexico (2001); Nicaragua (1998)	Argentina; Bolivia (Plurinational State of); Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Venezuela (Bolivarian Republic of)
Middle East and North Africa 8 economies	Algeria (2008); Jordan (2006); Morocco (2007)	Algeria (2008); Jordan (2006)	Algeria; Egypt, Arab Rep.; Morocco; Tunisia
High Income OECD 17 economies	Austria (2003); Canada (2010); France (2012); Greece (2010); Italy (2010); Japan (1951); Korea (1990); Slovak Republic (2004)	Canada (2010); France (2011); Germany (2009); Greece (2010); Ireland (2011); Italy (2010); Japan (1951); Korea (1990); New Zealand (2008); Slovak Republic (1963); United Kingdom (1999)	Australia; Austria; Canada; Czech Republic; France; Germany; Greece; Ireland; Italy; Japan; Korea, Rep.; Netherlands; New Zealand; Slovak Republic; Spain; United Kingdom; United States
South Asia 6 economies	Afghanistan (2007); Bangladesh (2003); India (1996); Nepal (2011); Sri Lanka (1988)	Bangladesh (2003); India (1908 amended 2002); Nepal (1996 amended in 2003); Pakistan (1908); Sri Lanka (1988)	Afghanistan; Bangladesh: India

Region and number of economies surveyed	Countries that have laws for out of court mediation and/or conciliation (year of enactment)	Countries that have laws for referral of cases to mediation and conciliation (year of enactment)	Countries where the arbitration institutions act as the leading provider for mediation and/or conciliation services
Sub-Saharan Africa **22 economies**	Mauritius (2010); Mozambique (1999); Nigeria (2005); Uganda (2000): Burkina Faso (2012)	Burkina Faso (2009); Ghana (2010); Kenya (2010); Madagascar (2003); Mali (1999); Mauritius (2010); Mozambique (1961 with amendments 2009); Nigeria (2004); Rwanda (2008); Tanzania (1966 amended 2002); Uganda (2007); Zambia (1997)	Burkina Faso; Cameroon; Côte d'Ivoire; Democratic Republic of the Congo; Ethiopia: Ghana: Kenya; Madagascar; Mali; Mauritius; Mozambique; Nigeria; Rwanda; Senegal; Sierra Leone; South Africa; Uganda; Zambia

F. Note by the Secretariat on settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation - Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings - Comments received from States

(A/CN.9/WG.II/WP.188)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session (New York, 7-18 July 2014), the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[1] At its sixty-second session, the Working Group is also expected to continue its consideration of the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.[2]

2. In preparation for the sixty-second session of the Working Group, the Secretariat received comments from States which are reproduced below in the form in which they were received.

II. Comments received from States

A. Enforceability of settlement agreements resulting from international commercial conciliation/mediation

1. Germany

Original: English
Date: 17 November 2014

The fundamental questions when examining the desirability and feasibility of an instrument dealing with cross-border enforcement of "international commercial settlement agreements resulting from international commercial mediation or conciliation" in our view are the following:

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[1] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 129.

[2] Ibid., para. 128.

(a) Is there a need for such an instrument, given that parties could have recourse to arbitration and make use of the possibility of an "award on agreed terms"?

(b) Is there a substantial difference between an agreement resulting from mere negotiation and an agreement resulting from mediation/conciliation that would justify why such an agreement would be enforceable under different terms and conditions than a "simple" agreement, and if yes: what exactly makes that difference?

The question ad (a) can be answered once it is clearer what exactly can be expected from an instrument dealing specifically with mediated/conciliated settlements.

Concerning the question ad (b), our initial reaction is that there is no fundamental difference between agreements which are the outcome of (simple) negotiation, and agreements resulting from mediation or conciliation. Their legal nature does not change, they remain agreements. Their binding nature derives from party autonomy, and they are subject to the rules of contract law. Possible justifications for granting them expedited enforceability could be:

- The promotion of amicable settlement (as they end a dispute between the parties, and enforceability enhances trust in the outcome). We doubt whether this is a convincing justification. The same could be said for agreements reached via simple negotiation.
- The idea that the settlement results from a due ADR process with an independent and impartial neutral, who guarantees a fair and highly reliable/legally impeccable outcome. But is that really true, given the huge differences in ADR processes, qualification of neutrals, procedural standards etc.?

In addition, it seems unclear to us whether the project aims at introducing conditions under which a State has to declare an international commercial settlement agreement resulting out of mediation or conciliation to be enforceable (uniform or model law?), or whether it is about declaring an agreement that has been made enforceable in one State to be enforceable in another State (private international law?), or both. In any event, the conditions for enforceability would have to be spelled out in detail.

Whatever the policy justification and scope may be, we think that the project will face a number of challenges. It is important to be realistic. The following conditions and topics seem to be relevant at first sight (and we do not consider that list to be exhaustive):

(a) The basis of any such instrument is full party autonomy both for the agreement to mediate and for the mediated agreement, including where relevant choice of the applicable law. Consequently, the scope must be limited to commercial agreements between businesses only; e.g. consumer contracts, labour contracts, housing contracts (rents) have to be excluded from scope. Otherwise, serious conflicts will arise out of the need to take account of mandatory laws aimed at protecting the interests of weaker parties. If those problems had to be tackled (and it is unclear whether any solution would be possible), the instrument might become overly complex and difficult to use.

(b) A (functional) definition of "international commercial mediation/conciliation", both in a negative way (i.e. excluding "arbitration" on the one hand, simple negotiation on the other hand) and in a positive way (as a process that involves a neutral/neutrals; that does not exclude access to court; the outcome of the process being contractually binding on the parties only if they give their consent, etc.). How should the international element be determined? Should there be a right of a party to terminate the process at any time? Could there be processes whereby the neutral is required to make a recommendation, even though one of the parties prefers to stop the process? Which law governs the mediation/conciliation process? Is there a "location" of the procedure? Do we need to address issues of "law or forum shopping"?

(c) The formal and substantive requirements for the mediation/conciliation agreement (that is: the agreement to have recourse to mediation or conciliation for dispute resolution) need to be addressed. If the parties intend the outcome of the mediation/conciliation, i.e. the mediated/conciliated settlement, to be subject to an expedited enforcement under that new instrument, this intention has to be expressed in the mediation/conciliation agreement at the time parties agree to have recourse to mediation/conciliation. The agreement should be explicit and made in writing (to ensure that it can be proved if need be), and there need to be mechanisms to ensure that parties are aware of (the impacts of) entering into the agreement to submit the possible outcome of the mediation/conciliation process to expedited enforcement.

(d) Requirements of due process that must be respected if the settlement agreement resulting from the international commercial mediation/conciliation is to enjoy expedited enforcement. The difficulty is that mediation/conciliation are relatively informal processes. Nevertheless there can be a number of requirements that can be regulated such as the impartiality and independence of the mediator(s)/conciliator(s), the equal treatment of the parties, and in particular in case of an evaluative process: the right to be heard on any fact or circumstance on which the mediator/conciliator bases his or her evaluation (which raises the question of conditions for using techniques such as a *caucus*). Violation of substantial procedural rights should in principle be a ground for refusing enforceability of the agreement. Violation of *ordre public* should also be a ground for refusal of enforceability. In addition, an agreement that is (partially) invalid under the relevant applicable law should not be granted enforceability (see the following point). There need to be mechanisms that ensure that each party can obtain protection against enforceability of settlements that do not fulfil the conditions a set out in the instrument.

(e) Interaction with contract law: A mediated or conciliated settlement agreement is not an award, or an award on agreed terms. There is no arbitration procedure, nor does the recourse to mediation or conciliation exclude access to court. The outcome of the mediation or conciliation remains an agreement between the parties and thus is subject to the rules of substantive contract law (see above). If it enjoys enforceability, the terms of the agreement can be enforced in an expedited way. However, it is not excluded that the agreement as such could be invalid under the applicable substantive law. The agreement is not final, i.e. the parties remain free to modify their agreement etc. The question needs to be addressed what will be the interaction between the content and the validity of the agreement and its enforceability. In other words, if the agreement is (partially) invalid under substantive law, or if the parties decide to modify it, what effect should this have on the enforceability, and by which mechanisms can these effects be implemented? Our view is that a State cannot be required to grant enforceability to an agreement which, under its law, including the choice of law rules, would be invalid or contrary to public policy or otherwise incapable of being enforced. And if enforceability has (erroneously) been granted, the other party must have an opportunity to contest the decision to grant enforceability in court.

We also draw attention to the work of the Hague Conference on the enforcement of mediated agreements in the context of international family conflicts. The analyses given in the working documents of the group of experts dealing with that project might be of assistance when examining the feasibility of a possible instrument on cross-border enforcement of mediated/conciliated settlements.

2. Canada

Original: English, French
Date: 8 December 2014

A fundamental question raised by this project is what policy rationale justifies giving expedited recognition and enforcement to one type of contracts over all the others (i.e., expedited recognition and enforcement of settlement agreements is available while a similar expedited treatment is not available for a sale agreement). If the scope of the project were restricted to settlement agreements providing liquidated

damages, it would be more akin to a judgment or an award and expedited enforcement procedures could more easily be justified. To the extent the settlement agreement covers aspects other than pecuniary settlements, it will be subject to a larger number of exclusions under domestic law with respect to specific performance, making the enforcement less likely. It will also be subject to interpretation by the parties and potentially by a court of law. For these reasons, the project should contemplate a convention on the recognition and enforcement of pecuniary settlements.

Formalistic requirements should be limited to the maximum extent possible in order to limit grounds for setting aside the settlement agreement, solely for reasons of form, at the time enforcement is sought. In that context, the signature of the mediator or the parties' representatives (counsel) should not be a requirement for the enforcement of the settlement agreement.

Given the adoption of the UNCITRAL Model Law on International Commercial Conciliation by a number of jurisdictions, the current project should build on principles found in the Model Law and promote an approach consistent with the Model Law.

3. United States of America

Original: English
Date: 23 December 2014

At the Commission session in July 2014, the United States submitted a proposal, A/CN.9/822, suggesting that UNCITRAL develop a convention on the enforceability of conciliated settlement agreements that resolve international commercial disputes.[3] The Commission decided that Working Group II should consider this proposal at its February 2015 session and report to the Commission on the feasibility of work on the topic.[4] The United States greatly appreciates the work that the Secretariat has done to prepare a paper[5] to provide background on the topic, and we hope that the Working Group will endorse the proposal. This paper is intended to provide further explanation of the issues raised in A/CN.9/822, in light of questions that were raised at the Commission session and in other consultations.

(i) The Need for a New Convention

One question that has been raised in response to the proposal is whether commercial parties' willingness to enter into conciliation is affected by the legal regime that would apply to the enforcement of any resulting settlement. UNCITRAL's previous work on conciliation suggests that enforceability does matter: "Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award."[6] A recently-conducted international survey also supports the view that a convention that facilitated enforcement would encourage conciliation. In that survey, only 14 per cent of respondents (including private practitioners, mediators, academics, and others)believed that, under the current legal framework in their home jurisdiction, it would be easy to enforce an international commercial settlement agreement arising from a conciliation that took place

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[3] In this paper, as in existing UNCITRAL instruments, the term "conciliation" refers to "a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute." UNCITRAL Model Law on International Commercial Conciliation, art. 1.3. Thus, this paper does not intend to differentiate conciliation from mediation.

[4] Report of the United Nations Commission on International Trade Law, Forty-seventh Session (7-18 July 2014), A/69/17, para. 130.

[5] A/CN.9/WG.II/WP.187.

[6] UNCITRAL Model Law on International Commercial Conciliation, Guide to Enactment, para. 87.

elsewhere.[7] Furthermore, 74 per cent of the respondents believed that a convention on enforcement of conciliated settlement agreements would encourage the use of conciliation (with another 18 per cent believing that it could possibly do so).[8] Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute found that over 93 per cent of respondents would be more likely (either "much more likely" or "probably") to mediate a dispute with a party from another country if that country had ratified a convention on the enforcement of mediated settlement agreements.[9] Over 87 per cent of respondents thought a widely-ratified convention could "definitely" or "possibly" make it easier for commercial parties to come to mediation in the first place, and over 90 per cent thought that the absence of an international enforcement mechanism presents an impediment to the growth of mediation for resolving cross-border disputes.[10] Additionally, the U.S. Council for International Business — i.e., the U.S. branch of the International Chamber of Commerce (ICC) — sought input on the subject from its membership, which expressed the view that a convention would be useful.

Thus, the United States believes that a convention as outlined in the proposal would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement could be relied on and easily enforced. (In particular, when a commercial dispute arises from a contractual relationship, conciliation may not be an attractive option if even a successful conciliation would result in a settlement that would merely have the same legal status as the original contract and would have to be the subject of litigation under contract law.)

Some who have questioned why a convention is needed have noted that many sets of arbitration rules permit parties who settle during an arbitration to have the settlement turned into a "consent award" (or an "award on agreed terms"). The settlement is treated as if it were an award, even though the parties themselves (rather than an arbitral panel) determine the outcome. However, adapting this feature of international arbitration to the enforcement of conciliated settlements would be difficult. First of all, if a dispute is settled through conciliation and subsequently submitted to arbitration solely in order to obtain a consent award, questions persist as to whether such award would be enforceable under the New York Convention, as it might not arise from "differences between the parties."[11] Furthermore, even if arbitrators could be persuaded to serve in an arbitration whose only function is to rubber-stamp an agreement that has already been reached between the parties, parties should not have to initiate arbitration — with the attendant costs and delays — merely in order to bless a settlement. Many parties would likely not be willing to do so at the end of a successful conciliation, at a time when the parties presumably expect compliance and thus would see extra formalities as an unnecessary cost. (Even if they were willing to initiate arbitration merely to have the settlement blessed, it may not be appropriate in all situations, such as if court proceedings have already commenced.)

Moreover, the problems identified in the survey responses noted above persist even to the extent it is possible to convert conciliated settlements into consent awards. Assuming parties are able to enforce settlements under contract law or transform them

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[7] S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, at 44, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.

[8] Id. at 45.

[9] www.imimediation.org/un-convention-on-mediation.

[10] Id.

[11] See, e.g., Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54 UCLA L. Rev. 1385, 1402 (2007) ("It has been argued that a successful mediation resolves all differences. Therefore, if parties agree to arbitrate after a mediation agreement is reached, this is not a valid agreement to resolve differences."); Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation — Worldwide*, 80 Notre Dame L. Rev. 553, 589 n.174 (2005) ("The Convention applies to awards 'arising out of differences between persons, whether physical or legal.'… When the parties reach a mediated agreement before invoking arbitration, there is then arguably no dispute and no 'differences' to give rise to the arbitration.").

into consent awards, enforcement of conciliated settlements is still seen as too difficult in the cross-border context. Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.

(ii) Status of Settlements under a Convention

At the UNCITRAL Commission session in July 2014, several questions about the operation and effect of a convention were raised with respect to the proposal, including whether a convention would merely convert conciliated settlements into arbitral awards, and "whether the new regime of enforcement envisaged would be optional in nature."[12]

The proposal does not envision that a convention would transform conciliated settlements into arbitral awards. Rather, although the convention would give conciliated settlements an enforcement regime similar to that provided under the New York Convention, conciliated settlements would remain a separate legal concept, entirely distinct from (though coequal to) arbitral awards. The basis for a conciliated settlement would still be the voluntary agreement by the parties, rather than a decision of an arbitral panel. The settlement would simply be more easily enforceable internationally than it would be if it remained merely a contractual agreement. Given that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them).

At the same time, because the conciliated settlement has its basis in the parties' voluntary agreement, any enforcement regime should respect the contours of that agreement, including any limitations that the parties establish. For example, if the parties include a forum selection clause specifying that enforcement could only occur in a particular jurisdiction, the convention should not override that clause. Similarly, if the parties include in the settlement other limitations on remedies, such as requiring any disputes to be brought back to the conciliator before enforcement is sought, enforcement under the convention should only be available to the degree specified. By extension, parties could opt out of the convention's framework entirely by specifying in the settlement that enforcement under the convention is unavailable. By including limitations of this nature, the convention would respect the voluntary nature of conciliated settlements and would not diminish the ability of the conciliation process to bring disputing parties to mutually-agreeable resolutions.

(iii) Complex Settlements and Other Possible Exceptions

Another question raised in response to the proposal is whether complex conciliated settlements (e.g., those containing complicated non-monetary elements, such as long-term obligations) would be suitable for enforcement under the convention. However, in general, arbitral awards also have the potential to include similarly complex elements, depending on the issues the arbitrators are asked to resolve. Thus, courts enforcing arbitral awards under the New York Convention could already be confronted by a need to enforce such complex elements and order various forms of non-monetary relief. A new convention providing a similar enforcement mechanism for conciliated settlements thus should not present courts with a qualitatively different set of problems. At the same time, conciliated settlements may include complex obligations more frequently than arbitral awards do; the proposed convention could thus require courts to enforce such complex obligations more often. Providing for the possibility of limiting the convention's application when a conciliated settlement includes non-monetary obligations may therefore be prudent. The simplest approach may be to permit states to make a reservation limiting the extent to which the convention applies to non-monetary elements of conciliated

[12] Report of UNCITRAL, supra note 2, at para. 124.

settlements. Under this approach, the default rule would be full coverage of both monetary and non-monetary elements of conciliated settlements, but if a state believes that its courts would struggle to enforce certain types of non-monetary elements of settlements, it could limit its obligations in those respects.

A related question is which other exceptions should apply to a state's obligation to enforce conciliated settlement agreements. Some of the exceptions in Article V of the New York Convention would likely need to be retained, while others could be modified or replaced by other exceptions more appropriate for the context of conciliation, as discussed below.

(iv) Technical Feasibility

An additional question that has been raised about the proposal is whether the New York Convention is the appropriate model on which to base a new convention. Using the New York Convention as the model for work on enforcement of conciliated settlements — a model that sets forth a broad obligation to recognize and enforce, and provides a set of exceptions to that obligation — would have the benefit of simplicity, focusing on the result (i.e., recognition and enforcement) rather than dictating particular procedures to reach that goal. Thus, a new convention would not need to be long and complex.

Only a few articles would be needed to set forth the central content of a convention. The main obligation, to recognize and enforce conciliated settlements, could be based on Article III of the New York Convention. This article could also require that Parties to the convention not impose substantially more onerous conditions on the recognition and enforcement of international conciliated settlements than are imposed on either domestic conciliated settlements or on arbitral awards.

Next, a set of definitions would be needed. A definition of "conciliation" could be based on Article 1.3 of the Model Law.[13] Similarly, a definition of "international" could be based on Article 1.4(a) of the Model Law, which addresses parties that have their places of business in different states.[14] The definition of "commercial" in the Model Law may not be as well suited for a convention, as it only provides a non-exhaustive list of examples. Instead, this definition could be drawn from other instruments, such as the draft Hague Principles of Choice of Law in International Commercial Contracts, which in Article 1 state that they apply to contracts "where each party is acting in the exercise of its trade or profession" but not to consumer or employment disputes. Similarly, a definition would be needed for a conciliated settlement agreement, specifying that the agreement should be in writing, that it should be signed by the parties to an international commercial dispute, and that the parties should have used conciliation.

The other key provisions of a convention, in addition to the definitions and the obligation to recognize and enforce conciliated settlements, would be the exceptions to that obligation. Some of these issues could be addressed as exceptions similar to those in Article V of the New York Convention, while for other issues a reservation mechanism might be more appropriate. Generally-available exceptions might include the following:

- Conciliated settlements invoked against parties that were, under the law applicable to them, under some incapacity or that were coerced into signing the conciliated settlements;[15]

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[13] See footnote 1, supra.

[14] Article 10 of the Convention on Contracts for the International Sale of Goods (CISG) provides further guidance on this point, stating that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."

[15] This exception would be drawn in part from article V(1)(a) of the NY Convention. A reference to coercion would be useful to ensure that a court can refuse to enforce a conciliated settlement if a party did not sign it voluntarily. Article 3.2.6 of the UNIDROIT Principles of International Commercial Contracts provides guidance on the level of coercion relevant for this context — i.e.,

- Conciliated settlements that are not valid under the law to which the parties have subjected them or, failing any indication thereon, under the law of the country in which they were made;[16]
- Conciliated settlements the subject matter of which is not capable of settlement through conciliation under the law of the country where recognition and enforcement is sought;[17]
- Conciliated settlements that would be contrary to public policy to recognize or enforce;[18] and
- Conciliated settlements whose own terms would preclude enforcement as requested.[19]

Other issues may be more properly addressed by permitting Parties to the convention to take a reservation limiting the convention's application when needed in order to allow implementation in a particular legal system:

- Applying the convention to conciliated settlements to which a government is a party only to the extent specified in the declaration;[20]
- Providing that a party to a conciliated settlement shall not be eligible to seek recognition and enforcement under the convention if that party has its place of business in a state that is not a Party to the convention;[21]
- Applying the convention to non-monetary elements of conciliated settlements only to the extent specified in the reservation;[22] or
- Applying the convention only to conciliated settlements in which the parties to the conciliated settlement have explicitly agreed that the convention would apply.[23]

Beyond provisions such as these, not many additional substantive rules would be needed in a new convention. Analogues to Articles IV (procedures for enforcement) and VI (suspension of proceedings) of the New York Convention could be included, as could a provision limiting application of the convention to conciliated settlements signed after the convention's entry into force. Otherwise, only a standard set of final provisions would be needed.

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an "unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion" of the conciliated settlement.

[16] Such an exception would be based on Article V(1)(a) of the New York Convention.

[17] Such an exception would be based on Article V(2)(a) of the New York Convention.

[18] Such an exception would be based on Article V(2)(b) of the New York Convention.

[19] As discussed earlier in this paper, such an exception would apply when, for example, the conciliated settlement includes a forum selection clause specifying that enforcement could only occur in a different jurisdiction, or when the conciliated settlement includes other limitations on remedies (e.g., requiring any disputes to be brought back to the conciliator before enforcement is sought, requiring disputes to be settled by arbitration rather than enforcement in court, or providing that enforcement under the convention is unavailable).

[20] Such a reservation would be intended to permit Parties to limit the application of the convention to address issues such as sovereign immunity, limitations on the remedies available against government entities, or lack of authority for certain government entities to enter into conciliated settlements.

[21] Such a reservation would provide Parties with the option of requiring reciprocity from other states in order for those other states' businesses to benefit from the convention (similar to article I (3) of the New York Convention).

[22] As discussed above, such a reservation would permit limits on enforcement under the convention for conciliated settlements that include long-term or complex obligations (other than an obligation by one party to pay a sum to another party) that courts may not necessarily be able to evaluate in a streamlined enforcement process and that may be more appropriately addressed under contract law.

[23] Such a reservation would permit a Party to apply the convention only when parties to a conciliated settlement opt in to the enforcement regime.

Thus, the United States continues to believe that developing a new convention along the lines set out in the earlier proposal would be not only a useful project, but a feasible one that the Working Group could accomplish in a relatively short period of time. We look forward to discussing these issues with other delegations.

B. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

1. Austria

Original: English
Date: 15 December 2014

The possibility of an arbitral tribunal to embark on efforts aimed at reaching a friendly settlement between the parties should be stressed in the text of paragraph 47 of the UNCITRAL Notes which currently reads as follows:

> "12. Possible settlement negotiations and their effect on scheduling proceedings
>
> 47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations."

Austria would like to present the following proposal for a possible revision:

The second sentence of paragraph 47 could be replaced by "Where appropriate the arbitral tribunal may suggest and facilitate settlement negotiations and — if asked to do so by the parties — guide or assist them in their negotiations." The third sentence should then begin with "In any case" rather than with "However".

This version reflects the common practice (which is considered efficient and time- and cost-saving for the parties) of amicable settlements directly within the arbitration proceedings, without the involvement of mediators.

III. ONLINE DISPUTE RESOLUTION

A. Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session (Vienna, 20-24 October 2014)

(A/CN.9/827)

[Original: English]

Contents

I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions. [1] The Commission decided inter alia at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.[3] It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.[4] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5]

4. At its forty-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirtieth session in Vienna, from 20 to 24 October 2014. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Ecuador, France, Germany, Greece, Honduras, Hungary, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, 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, Belgium, Bolivia (Plurinational State of), Chile, Czech Republic, Dominican Republic, Ghana, Libya, Netherlands, Peru, Qatar, Romania and Viet Nam.

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.
[2] Ibid., para. 218.
[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.
[4] Ibid.
[5] Ibid.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.

8. The session was also attended by observers from the European Union (EU).

9. The session was also attended by observers from the following intergovernmental organizations: Asian Clearing Union (ACU).

10. The session was also attended by observers from the following non-governmental organizations: Centre de Recherche en Droit Public (CRDP), Chartered Institute 0f Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Institute of Law and Technology (Masaryk University), Milan Club of Arbitrators (MCA) and Wuhan University Institute of International Law.

11. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah-Teck CHAN (Singapore)

Rapporteur: Ms. Laura JAMSCHON MAC GARRY (Argentina)

12. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.129);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II) (A/CN.9/WG.III/WP.130 and Add.1); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I) (A/CN.9/WG.III/WP.131).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group based its deliberations on the direction of the Commission, made at its forty-seventh session,[8] that the Working Group should address the text of Track I of the Rules and should report back on the issues set out in paragraph 222 of the report of the Commission's forty-sixth session (see, further, paragraph 17 below). The Working Group resumed its work on agenda item 4 also on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.130 and its addendum; A/CN.9/WG.III/WP.131).

15. The Working Group accordingly considered Track I of the draft Rules for resolution of online disputes, and also took into consideration the importance of different outcomes and enforcement mechanisms particularly for developing countries and those facing post-conflict situations, including arbitration, and issues of consumer protection. Progress was made on the draft text of this Track of the Rules, also on the basis of proposals submitted during the session. However, fundamental differences remained between States that allowed binding pre-dispute agreements to arbitrate and those that did not, despite the Working Group's strenuous efforts to

[8] A/69/17, paras. 137 and 138.

come to consensus. It was observed that further progress would require the draft Rules to reflect the Working Group's conclusions on this matter.

16. The deliberations and decisions of the Working Group with respect to this item are reflected in more detail in Chapter IV below.

IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

17. The Working Group took note of the Commission's instruction referred to in paragraph 14 above, i.e. that the Working Group should: (a) address the needs of developing countries and those facing post-conflict situations, in particular regarding an arbitration phase as part of the process; (b) include in its deliberations the effects of online dispute resolution on consumer protection in all States, including in cases where the consumer was the respondent party in an online dispute resolution process; (c) explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration. It was noted that some of these issues had been further addressed in a proposal by the Governments of Colombia, Kenya, Honduras and the United States.[9]

18. The Working Group agreed to address these matters in order to report back to the Commission on the same.

19. The need to make progress in crafting an effective and efficient way to resolve cross-border disputes, which would function in the real world, was affirmed. The importance of such an ODR system for supporting the growth in e-commerce, cross-border investment and access of micro and SMEs to international markets was recalled.

20. It was said that different jurisdictions had different approaches in relation to the binding nature or otherwise of pre-dispute agreements to arbitrate (differences, it was agreed, that the Rules should respect), but that despite such differences, there were many points of commonality in relation to the resolution of disputes up to the final stage. It was added that the Working Group should not try to use the Rules to resolve major policy differences that might in any event evolve over time.

21. A view was expressed that, in view of lack of access to courts and the need for efficient resolution of low-value, cross-border disputes, particularly in relation to developing countries and those in post-conflict situations, making arbitration available was important for those constituents that might wish and be able to undertake arbitration. It was, moreover, noted in support of that view that the Rules would not override national mandatory law and rules.

22. It was further stated that a proposal requiring vendors to put consumers on one or another track based on their geography would be impractical, and concerns were expressed as to the suggestion that UNCITRAL or the UNCITRAL Secretariat maintain a list of States in which pre-dispute agreements to arbitration were not, according to the law of those States, binding or enforceable.

23. Another view was expressed that the Working Group had made good technical progress on Track II at its twenty-ninth session, and that the implementation mechanism of an Annex (proposed at its twenty-seventh session) could provide a means to accommodate States in which pre-dispute agreements to arbitrate were binding on consumers, and those in which they were not. It was added that the implementation proposal had been suggested as a compromise to accommodate States that sought arbitration in ODR in their jurisdictions.

24. It was said that arbitration was not a necessary component of ODR, and that Track II could provide for an efficient way of dispute resolution. It was further said

[9] See document A/CN.9/WG.III/WP.125.

that Track II could offer a good modality for dispute resolution in particular for any State that might not dispose of a functional judicial system for enforcing arbitral awards. It was added that the design of ODR systems should not prejudice the effective development of such judicial systems.

25. The context for the Working Group's deliberations — low-value disputes — was emphasized, and it was recalled that the average online purchase was in the range of US$ 60. It was suggested, therefore, that the Working Group should focus on developing a set of rules and an ODR system that were easily understandable to both consumers as well as micro and SMEs, and was likewise cost-effective (as some existing systems were said to be). It was added that the Working Group could, in that vein, focus both on simplifying the draft text and eliminating any unnecessary prescription. In this regard, the Working Group recalled the outcome of the consultation of the Secretariat with experts as recorded in paragraph 28 of document A/CN.9/801.

26. It was suggested that one area on which the Working Group could focus would be the draft guidance document for ODR providers, including issues such as transparency and qualifications of neutrals (see also document A/CN.9/WG.III/WP.128).

27. Another view was expressed that, in light of the evidently low-value nature of transactions that were intended to be the subject of the Rules, consumers would be implicated and that some jurisdictions did not permit arbitration agreements made prior to a dispute arising to be binding on consumers. It was proposed that the proposed Annex referred to in paragraph 23 above should be further considered before other options were tabled.

28. A different view was expressed that the proposed Annex was too reminiscent of a binding international legal instrument (such as a treaty) to which States parties could opt in or opt out, and that a compromise could better encompass all the different options.

29. It was underscored that efficiency in the resolution of low-value online disputes should be considered paramount, given the very high volume of online disputes. In this regard, the very small fraction of those disputes in which alternative dispute resolution online was available and that in practice culminated in litigation before the courts was also highlighted.

30. It was stated that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and UNCITRAL Model Law on International Commercial Arbitration provided safeguards for consumers, for example in that consumers could object to the validity of the arbitration agreement or award at the stage of enforcement.

31. It was said that simplified arbitration rules for low-value disputes such as those envisaged in Track I of the Rules raised the risk of weakening the traditional arbitration procedure, which was an indispensable instrument for international trade.

32. Another view was expressed that it was not possible to give a clear legal answer in relation to the validity of an arbitration agreement made online and involving cross-border transactions to which consumers were parties.

B. Reporting on the questions raised by the Commission (see, paras. 17 and 18 above)

33. Several delegations addressed the questions raised by the Commission, as recalled in paragraphs 17 and 18 above. In relation to question (a), a number of delegations suggested that an arbitration track within ODR proceedings was not necessary, for the reasons set out in paragraph 24 above, and moreover because of the ability of a non-arbitration system to accommodate all jurisdictions. It was furthermore asserted that arbitration awards would be unlikely to be enforced in practice for reasons of cost, and therefore did not add value to a non-arbitration

system. In response, other delegations observed that a binding arbitration track of the Rules was critical to developing countries and would contribute to an enabling legal environment by providing a seamless system for cross-border trade — for both business-to-business and business-to-consumer disputes.

34. In relation to question (b), some delegations suggested that including an arbitration track would be unable to provide sufficient consumer protection where the consumer was a respondent in the proceedings. In response, the view was expressed that binding arbitration was the only practical method of providing an effective alternative to traditional dispute resolution mechanisms for consumers in developing and post-conflict countries.

1. Two-track system

35. The Working Group considered whether a two-track system remained the most viable way to resolve the differences between jurisdictions with different legal conceptions of pre-dispute binding arbitration agreements on consumers.

36. One suggestion made was that the Working Group could work on the current Track II of the Rules, leaving the current Track I for separate consideration.

37. After discussion, it was agreed that the earlier consensus in favour of the two-track system remained. It was noted that the precise nature of the two-track system would be clarified, and notably whether it was envisaged that it would comprise two sets of Rules, or a single set of Rules with different tracks contained within them, and with the proposed Annex or another mechanism to operate as a bridge between them.

2. Res judicata

38. A view was expressed that the major difference between the two tracks was the issue of res judicata, in other words whether a process should end in an outcome that was final and binding (and so precluded access to the courts).

39. Another view was expressed that res judicata was not the primary issue at stake, given that the two tracks expressed different options for the final outcome of the Rules.

3. Enforcement

40. A question was raised as to whether the New York Convention would in practice be invoked in the context of low-value online disputes.

41. Views were expressed that the cost of enforcing an award under the New York Convention were too high to make that instrument viable in relation to the low-value disputes the subject of the Rules. In addition, it was noted that consumers from jurisdictions where pre-dispute arbitration agreements are considered not to be binding on them when subject to enforcement of an arbitral award made against them under the New York Convention might in practice be compelled to comply with the award, and that this as a consequence would have reduced confidence and willingness to use e-commerce — the opposite of the goal of an ODR system.

42. The view was expressed that, while it was unlikely that the parties would in fact seek enforcement of awards under the New York Convention for low-value claims, it was important to preserve the enforceability under that Convention for Track I in order to support respect of awards and to address the needs of business-to-business and business-to-consumer parties in ODR.

43. Another view was expressed that the Working Group was not the appropriate forum to address the complex legal issues surrounding enforcement of online awards under the New York Convention.

4. Simplicity and efficiency (see also paras. 25 and 29 above)

44. A number of delegations emphasised the need for simplicity and efficiency of the Rules, in order that they would be used and adopted by providers, purchasers and merchants in the online environment.

45. It was furthermore suggested that arbitration, as set out in the Rules, needed to be adapted for the digital space, and in particular simplified and streamlined to reflect an "Internet way of thinking".

5. Low-value claims

46. It was suggested that, as the system would address low-value claims only, the Rules should state clearly that they apply only to those claims (the nature of which would need to be considered). In this regard, it was noted that some concerns about the impact on consumers might thereby be mitigated.

6. Implementation of two tracks

47. Support was expressed for discussing the Annex proposal further (see above, paras. 27-28).

48. Another proposal was made to clarify the operation of Track I to ensure that it was clear that it would produce a binding result, discussed in paragraphs 51 and 63 below under the heading the "second proposal".

49. It was clarified that there was a difference in opinion in relation to the implementation mechanism by which the Rules would be offered to consumers. One suggestion that had been proposed was that the parties themselves could determine which Rules would apply to their dispute, acknowledging that such offer would typically be made by the merchant by way of a model clause. A different proposal, that of the Annex, was that a mechanism would be built into the Rules themselves that would prevent consumers in jurisdictions listed in the Annex from undertaking ODR proceedings pursuant to Track I of the Rules before the dispute had arisen.

50. Another suggestion was made that there ought to be a single set of Rules, with at least two outcomes — arbitration and non-binding recommendation among them — from which the consumer could select one, at a designated point in proceedings. It was said that whether the consumer's selection should take place at the time of transaction or the time of dispute could be further considered in that proposal. In support of that approach, it was said that a single, unified set of Rules would be clearer for consumers than two separate sets of Rules would, and moreover that it better reflected commercial practice, where most disputes were settled prior to an arbitration stage arising.

7. Arbitration and enforcement

51. A suggestion was made that arbitration was more consumer protective than a non-binding outcome, not least because permitting resort to courts would require in practice a much higher level of legal knowledge and result in much higher costs than a low-cost online resolution system. In response it was said that consumers should not be bound from the outset by a process that they might not be aware was binding on them.

8. New York Convention

52. It was queried whether the arbitration track envisaged by the Working Group, and examples of other arbitration-like systems referred to in the Working Group — which did not necessarily fulfil the provisions of the UNCITRAL Model Law on International Commercial Arbitration or reflect the procedural safeguards of the UNCITRAL Arbitration Rules — would comply in practice with the requirements of the New York Convention. It was said that referring to that Convention as a theoretical tool for low-value disputes might not be desirable.

53. A suggestion was made to reconsider the private enforcement mechanisms outlined in document A/CN.9/WG.III/WP.124.

9. Use of Rules in practice

54. It was said as a general matter that the Working Group had tried to come up with a very high and detailed standard, but that it should be acknowledged in practice that the Rules would not necessarily be implemented word for word by ODR administrators, but rather that they would be adapted, customized and improved upon by the private sector, similarly to practice in relation to the UNCITRAL Arbitration Rules (see also A/CN.9/WG.III/WP.123, para. 6).

55. In that respect, it was said that the Working Group could recall that it was not working on a treaty with reciprocal obligations, but rather a high level model for procedural rules that should be exhaustive and take into account all jurisdictions' laws.

10. Practical elements of ODR Rules

56. It was suggested that a primary focus of the debate should be on considering the type of mechanisms that merchants and ODR administrators should have in place in order to ensure consumers were streamed down a track appropriate to them, bearing in mind that no mechanism would be fool-proof. The need for the provision of simple information to consumers to ensure they were aware of the content and implications of the track was highlighted.

11. Conclusions in response to questions of Commission

57. After discussion, it was agreed that the Working Group had discussed a range of responses to the questions of the Commissions set out in paragraph 17 above, as reported to the Commission in the preceding subsections of this Report.

C. Proposals in relation to the applicable track of the Rules

1. First and second proposals

58. Two proposals were put forward in relation to the means by which parties to a dispute would select the applicable track of the Rules. There was general support for the constructive approach that the submission of these proposals represented.

2. The first proposal

59. The first proposal, initially made at the twenty-seventh session of the Working Group (see A/CN.9/769), would insert a statement in draft article 1(a) of Track I of the Rules to the effect that consumers in jurisdictions in an Annex thereto would be prevented from undertaking ODR proceedings pursuant to using Track I before the dispute had arisen (the "first proposal"). The first proposal would consequently require jurisdictions to elect to be included in such an Annex. It was suggested that the mechanism of that choice would be through an invitation or request to all United Nations Member States to opt in or out of the Annex, and would be made at the annual session of the United Nations General Assembly. The first invitation would be made, it was added, at the session at which the ODR Rules after adoption by the Commission were presented to that body; annual confirmations would be made thereafter.

60. In support of the first proposal, it was said that the proposal envisaged a very simple technological solution for putting buyers on the right track, to be included by the merchant on its website. The technology would automatically generate a dispute resolution clause for Track I or Track II of the Rules, based on a piece of information from the purchaser that it would normally provide during the course of the transaction, such as a billing or shipping address. It was added that the list of jurisdictions in the Annex would be updated every year at the United Nations General Assembly session, based on the decision of States to opt in or opt out at that time, and that under the first proposal the list of jurisdictions opting to be included in the Annex should be maintained by the UNCITRAL Secretariat. Proponents of the first proposal did not

believe it raised issues of liability for merchants or for the United Nations in relation to the list of States to be included in the Annex, and that a State's decision on whether to opt in or out of the list was a political one, informed by local legal considerations.

61. A concern was raised in relation to the first proposal, and specifically, that it required countries to make a choice as to how to categorize their national consumer protection law in terms of the implications of the Annex, but more importantly, to inform businesses and small and medium-sized enterprises of the implications of the Annex.

62. In relation to various queries raised in connection with the first proposal, it was said that the proposal would not require United Nations Member States to submit a declaration as to their inclusion or not in the Annex; but that, should they wish to make such a declaration, they could do so formally in any way acceptable as a matter of United Nations procedure. It was clarified that if a time lapse existed between a State changing its laws in relation to pre-dispute binding arbitration and its declaration relating to its inclusion or non-inclusion in the Annex at the session of the General Assembly, then the law in force at the time a consumer from that jurisdiction embarked on an ODR track would prevail.

3. The second proposal

63. A second proposal would provide, as regards the scope of application of Track I of the Rules, that the process would end in binding arbitration. Paragraph 1(a) would be annotated by a footnote indicating that pre-dispute arbitration agreements with certain buyers might not be considered valid under applicable national law in some jurisdictions, and consequently, awards arising out of such agreements might not be enforceable against a purchaser in those jurisdictions (the "second proposal"). That proposal also included revisions to paragraph 1(a) as follows: "For buyers who are located in certain States at the time of the transaction, a binding arbitration agreement capable of resulting in an enforceable award requires that the agreement to use the Track I Rules take place after the dispute has arisen." It was said that that component of the proposal might be regarded as a functional equivalent to a "second click", in other words, a post-dispute agreement by the consumer to arbitrate. The second proposal would also provide for amendments in the scope of application provisions in Track II of the Rules consistent with those proposed in Track I.

64. The second proposal also included two model clauses, one for Track I, as follows: "Subject to the provisions of Article 1(a) of the UNCITRAL ODR Track I Rules, any dispute, controversy or claim arising hereunder and within the scope of the UNCITRAL ODR Track I Rules providing for a dispute resolution process ending in a binding arbitration, shall be settled by arbitration in accordance with the UNCITRAL ODR Track I Rules presently in force"; and a second for Track II as follows: "Where, in the event of a dispute arising hereunder and within the scope of the UNCITRAL ODR Track II Rules providing for a dispute resolution process ending in a non-binding recommendation, the parties wish to seek an amicable settlement of that dispute, the dispute shall be referred for negotiation, and in the event that negotiation fails, facilitated settlement, in accordance with the UNCITRAL ODR Track II Rules presently in force."

65. It was said that this second proposal would also include, separate from the Rules, guidance for ODR administrators that would suggest the ODR administrator might check the purchaser's location, relying on mailing address or billing address, and advise vendors that they should consider the appropriateness of pursuing binding arbitration accordingly.

66. In support of the second proposal, it was said that it provided more broadly applicable procedural rules, that could work for both business-to-business and business-to-consumer transactions. It was further said that it avoided perceived complexity with an approach that touched on legal issues such as nuanced national consumer laws, in determining the residence of purchasers and a list procedure that was not practicable. In response, it was said that the phrase in paragraph 1(a) of the

second proposal to "buyers who are located in certain States" might in reality require a list of such States to be maintained in any event.

67. A query as to whether the UNCITRAL Secretariat could maintain such a list, or whether the United Nations General Assembly could serve the function as envisaged under the first proposal, was deferred.

68. A further proposal to amend the language of draft article 1(3) of Track I of the Rules as follows, was made: "These Rules shall govern the ODR proceedings except where any of the Rules is in conflict with a provision of applicable law from which either of the parties cannot derogate". It was suggested that that proposal did not provide sufficient guidance as to how parties to a dispute would change track if applicable law so required.

69. The Working Group was invited to consider approaches that would bridge the diverging views expressed in relation to the first and second proposals.

4. The third proposal

70. In that respect, a third compromise proposal was put forward, which would modify articles 1, 6 and 7 of Track I of the Rules. It was said that this proposal would in essence create a single set of Rules providing for different outcomes, and would take account of existing ODR practices as well as the requirements of different legal systems.

71. It was said that this third proposal would also take into account consumer protection issues. It was also noted that under the proposal, paragraph 1(a) of article 1 of Track I of the Rules would be deleted.

72. That proposal read as follows:

"The Purpose and Principles of Drafting

The purpose of drafting the Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

(1) The Rules should provide an easy, fast, cost-effective procedure for dispute resolution in low-value, high-volume electronic commerce transactions.

(2) The Rules should create a safe, predictable legal environment for transactions, to ensure traders' confidence in the online market.

(3) The Rules should be able to facilitate micro, small and medium-sized enterprises' access to international markets through electronic commerce and mobile electronic commerce.

Principles for drafting the Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

(1) Drafting of the Rules should be based on an Internet way of thinking, making clear the differences between traditional transaction disputes and online transaction disputes, and providing a resolution mechanism that conforms to the Internet environment of online transaction disputes.

(2) Drafting of the Rules should take into account of the current practice in dispute resolution for electronic commerce, as well as the enforceability of the ODR procedure, in order to avoid inconformity of the design of the Rules to e-commerce practice.

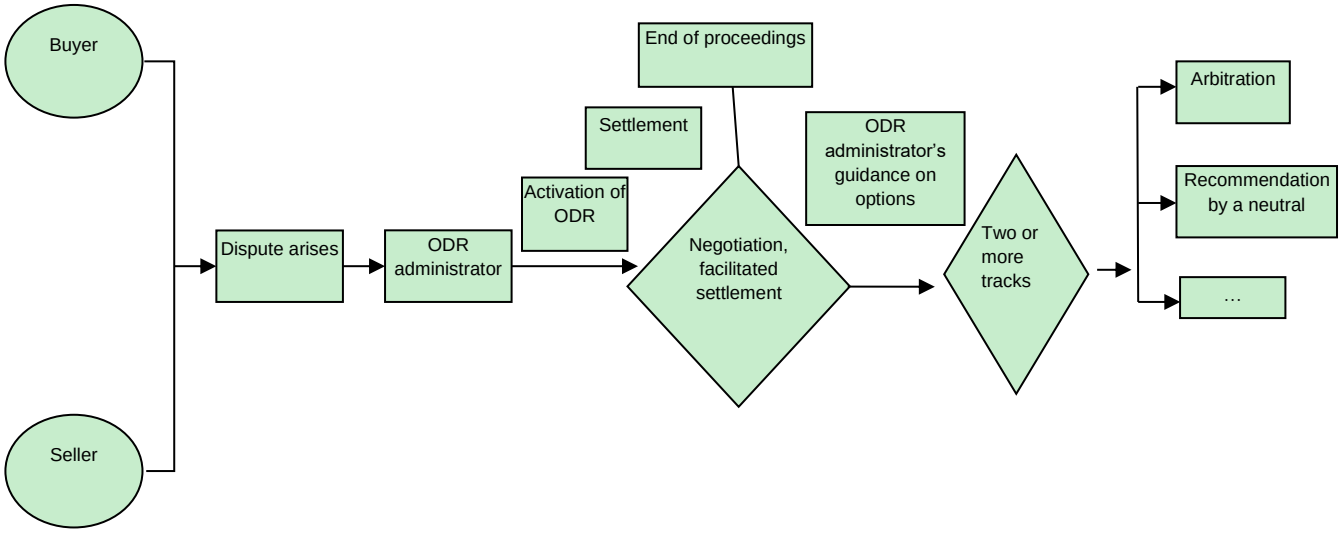
(3) The design of the Rules should take into consideration of differences of legal systems of different States, minimizing the inconformity of the ODR mechanism to the legal system in which it operates, in order that the Rules can be implemented in as many jurisdictions as possible.

A comparative analysis of advantages and disadvantages of Track I and Track II

	Track I	Track II
Binding or non-binding	Binding	Non-binding
Application	Subject to consumer protection regulations	Not subject to consumer protection regulations
Degree of settlement	Complete settlement	In case of unsuccessful mediation, an unbinding recommendation
Cost and time of dispute resolution	Requires certain cost and time	In case of unsuccessful mediation, cost and time cannot be estimated, often higher and longer than in arbitration, as shown by current situation

Rationale of the design of Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

The analysis in the above section shows that Track I and Track II each has its advantages and disadvantages. The new design should maintain their advantages and reasonably integrate them (see the figure below)."



Proposed articles of the Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

Draft article 1 (Scope of application)

"1. The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

"1 bis. Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be exclusively resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause')."

"2. These Rules shall only apply to claims:

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the sales or service contract referred to in paragraph 1; or

(b) That full payment was not received for goods or services provided.

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

Draft article 6 (Facilitated settlement)

"1. Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)].

"2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.

"3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) the ODR proceedings shall move to the next stage of proceedings pursuant to draft article 7 (Guidance of ODR Administrator)."

Draft Article 7 (Guidance of ODR Administrator)

"If the Neutral has not succeeded in facilitating a settlement at the expiry of the facilitated settlement stage, the ODR administrator shall, on the basis of information submitted by the parties, present to the parties the following options, and ensure that they are aware of the legal consequences of the choice of each track:

(1) Arbitration (as referred to in draft article 7 of Track I);

(2) The Neutral's recommendation (as referred to in Track II);

(3) ..."

73. The third proposal was generally welcomed by the Working Group. It was suggested that certain elements might be modified, for example instead of consent by the parties to undertake the final stage of a dispute resolution process, that a streaming function such as that provided for by the Annex (in the first proposal) might be used. Alternatively, parties might be offered the opportunity to consent to arbitrate immediately after a dispute had arisen instead of at the end of the facilitated settlement stage.

74. A question was also raised as to whether the third proposal shifted the function of the proposed Annex to the ODR administrator. Consequently, a concern was raised that the ODR administrator would need to be in possession of up-to-date and sufficient information on relevant jurisdictional considerations to be able to advise the parties accordingly, and in any event, whether administrators would be willing in practical terms to undertake that responsibility.

5. The fourth proposal

75. A fourth proposal was made, to replace paragraph 1(a) of article 1 as set out in A/CN.9/WG.III/WP.131, as follows: "Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer (a) that disputes relating to the transaction and falling within the scope of the Rules, will be exclusively resolved through ODR proceedings under these Rules and whether track I or track II of the Rules apply to that dispute ('the dispute resolution clause') and (b) for buyers whose billing address is in a State listed in the designated website, that in certain states, including the State of the buyer's billing address, a binding arbitration agreement capable of resulting in an enforceable award, requires that the agreement to use Track I take place after the dispute has arisen." It was said that in addition, a footnote identical to that proposed in the second proposal (see CRP.1/Add.1[para. 62 above]) would be inserted at the end of that phrase.

76. That proposal would also insert a new article after article 6, which it was said would provide for additional safeguards to consumers. It was said that that provision would include two paragraphs, as follows: "1. If the dispute resolution clause provides that Track I of the Rules applies and the buyer's billing address is not in a State listed in the designated website, or if it provides that Track II of the Rules applies, then the proceedings shall move to the applicable track pursuant to articles […]. 2. If the dispute resolution clause provides that Track I of the Rules applies, and the buyer's billing address is in a State listed in the designated website, the ODR administrator may suggest measures to address the situation."

77. It was explained that the fourth proposal incorporated elements of the first proposal in that it would envisage a list of jurisdictions, similar to that in the proposed Annex, and that the list would be informational, non-exhaustive and non-binding in nature. Thus a State would take a policy decision on whether or not to request inclusion on the list, and that decision would not necessarily represent an exhaustive position of its domestic law. It was added that while the first proposal sought to place the consumer on the relevant Track through an automated selection mechanism, the fourth proposal was based on the understanding that it was impossible to guarantee that consumers would never agree to pre-dispute agreements to arbitrate disputes in jurisdictions in which such decisions were not binding.

78. The fourth proposal, it was noted, also included elements of the second proposal. Accordingly, the fourth proposal would place the responsibility upon vendors to notify buyers with billing addresses based in listed jurisdictions that pre-dispute agreements to arbitrate might not be binding in those jurisdictions. A vendor would not, however, be precluded from offering a binding arbitration track to purchasers with billing addresses in those jurisdictions. It was noted for example that there might be cases in which, even though a buyer's billing address was located in one of those jurisdictions, there could nonetheless be justifications for offering binding arbitration.

79. It was also agreed that the fourth proposal would differ from the second proposal by providing that, when moving to an arbitration phase, the ODR administrator (or, conceivably, the neutral) could take such action as might be appropriate, such as to notify parties that the purchaser's billing address was from a listed jurisdiction.

80. The fourth proposal was also generally welcomed by the Working Group. It was acknowledged that the fourth proposal was not yet complete in all respects — for example, that the entity that would maintain such a list was yet to be determined.

6. Proposal for an Annex or list of countries under the first and fourth proposals

81. In relation to the list of countries proposed in an Annex (first proposal) or website (fourth proposal), it was clarified that the UNCITRAL Secretariat was not at this stage able to provide information in relation to whether the General Assembly or its Secretariat would be willing or able to accept proposals to maintain such a list. It was noted that the Vienna Convention on the Law of Treaties (1969) provided specific treaty-based provisions on the authority of governments to enter into binding treaty obligations, and to try to adapt such procedures for a non-binding instrument such as a list or Annex to the Rules raised questions of public international law, as well as practical questions, which needed to be carefully considered. It was underscored that the Working Group might wish to bear in mind that the question of whether the United Nations General Assembly would maintain any such list or Annex needed to be clarified further with the relevant services within the United Nations; a task that the UNCITRAL Secretariat could undertake, as it was a part of the United Nations Secretariat.

7. Further discussion of the third proposal

82. It was noted that draft article 7 of the third proposal provided that an ODR administrator would present options to the parties should they fail to reach a facilitated settlement. Those options consisted of (1) binding arbitration; or (2) a neutral's recommendation; and (3) the possibility of a third, yet to be determined

outcome of proceedings. Three issues were raised in relation to that draft article 7. First, it was suggested that the first two options were sufficient (as they reflected the two Tracks under the draft Rules) and retaining them alone would enable better implementation of the Rules. Guidance was also sought on what a third option might entail. After discussion, there was broad support for the proposition that only two options should be provided to the parties, namely arbitration and a recommendation by the neutral, and the possibility for a third option should be deleted.

83. Second, a suggestion was raised that parties that had agreed to use the ODR Rules should not be able to opt out of a final determination (whether that be a recommendation or an arbitral award) part-way through the process.

84. Third, clarity was sought on the consequences that would ensue if parties failed to agree on the proposed track. One suggestion made was to avoid this situation arising by applying a default rule to the effect that only the consumer would be presented with the option to determine the procedure to be followed. Alternative suggestions were that the term "buyer" could be used, as most buyers were consumers in practice, or that options should be offered to all parties so as to avoid favouring one side or another in a transaction.

85. Another suggestion was that only consumers from jurisdictions in which pre-dispute agreements to arbitrate were not binding should be permitted the right to exercise an option to determine the nature of the final stage, and that all other parties would be bound by their initial agreement made at the time of transaction. Such a proposal, it was noted, would also require an Annex or list to identify the consumers that would be given an option to decide the option for the final stage. It was also recalled that business-to-business parties and consumers from some other jurisdictions would not be precluded from agreeing to pre-dispute binding arbitration.

86. It was further suggested that the election of an outcome for the final stage could be made earlier in the process, such as when a dispute arose. In response, it was noted that the overwhelming majority of claims were settled before the end of a facilitated negotiation stage, and so the proposal in its current form would reduce the burden on both the ODR administrator and on the parties.

87. A concern was raised that the third proposal did not permit pre-dispute agreements to arbitrate. Such agreements, it was said, would provide certainty for parties, especially in business-to-business disputes, and were a cornerstone of relevant dispute resolution systems in some jurisdictions.

88. In response, it was suggested that the market would itself provide the incentive for merchants to use a certain track, because merchants would be more inclined to choose an effective resolution mechanism to enhance their market share, and that the law in such jurisdictions might anyway not exclude post-dispute agreements to arbitrate.

89. Another suggestion was made to the effect that the third proposal did in fact permit pre-dispute agreements to arbitrate. It was said that the third proposal did not contradict applicable law and respected party autonomy. It was also said that more clarity might be needed on these aspects.

90. Another view was expressed that the final stage of the proceedings under the third proposal would be agreed only after the dispute had arisen, consequently excluding a binding pre-dispute agreement to arbitrate.

91. It was observed that differences in the understanding of the third proposal remained, notably as to whether or not the proposal contemplated pre-dispute agreements to arbitrate. It was stated that the proposed article 7 provided that two options would be offered to the parties for the final stage of the proceedings if facilitated settlement failed — i.e. arbitration or a recommendation by a neutral. There were two different interpretations of the consequences that would ensue should the parties fail to agree on the option to be applied. It was therefore observed that article 7 should include a default option for the final stage of the proceedings, but views differed as to whether that default option should be a recommendation by a neutral or

an arbitration. A third suggestion was that only the buyer should be given a choice at the time of failure of the facilitated settlement stage as to how to proceed.

92. It was identified that this difference of interpretation as to the default position indicated that there remained different understandings as to whether the third proposal contemplated a binding pre-dispute agreement to arbitrate.

93. Noting that an issue remained as to whether the arbitration phase proposed under article 7 was intended to have res judicata effect, it was recalled that the recommendation stage of proceedings under Track II of the Rules was intended to include a private enforcement component to ensure compliance with its outcome.

94. Noting these outstanding issues, the Working Group agreed to continue its deliberations on the basis of the third proposal, and the Secretariat was requested to prepare a draft for the thirty-first session of the Working Group on the basis of that proposal, also taking other proposals proffered at the session into account.

95. It was added (see para. 53 above) that the Working Group should consider further the matter of private enforcement mechanisms in the context of the various proposals made. In that respect, one delegation stated that it would submit a proposal for the next session of the Working Group regarding chargebacks, which, it was said, offered a practical and effective private enforcement mechanism. The Working Group requested the Secretariat to prepare such additional materials on chargebacks for consideration at a future session of the Working Group as resources permitted.

8. Further discussion of the second proposal

96. It was suggested that the legal effect of second proposal (see para. 62 above) was to offer a functional equivalent to a "second click", whereby a buyer, when submitting a claim, would effectively consent to binding arbitration by bringing the claim. It was added that an ODR administrator could advise both parties under that proposal as to whether it would be appropriate to arbitrate at the final stage of a dispute in a situation where the award might not be enforceable in the jurisdiction of the consumer. It was said that such an approach permitted the Rules to be contained in a single document, but at the same time, bridged the two tracks proposed at the twenty-seventh to twenty-ninth sessions of the Working Group.

97. It was asked in response whether there was any real difference between the second and third proposals, both of which included an advisory function on the part of the ODR administrator; and the notion that a buyer (in the second proposal) and both parties (in the third proposal) consented to the final stage of proceedings.

98. In addition, it was queried whether the fact of consent at that stage would be sufficient to ensure that consumers in relevant jurisdictions were not subject to an arbitration track of proceedings.

9. Further discussion of the fourth proposal

99. Two questions were raised in relation to the fourth proposal. First, it was asked whether the reference to a purchaser's billing address to determine which guidance was given to that purchaser was intended to supplant a conflict of laws analysis in respect of the governing law of the transaction or the dispute, and if so, whether that was inconsistent with existing conflict of law rules. In response, it was said that the proposals were not intended to have any implications regarding applicable law, but rather that the billing address was simply intended to indicate which notification was to be provided to the buyer.

100. Second, clarity was sought as to the possible consequences where vendors failed correctly to notify buyers of their options as regards a final outcome of the process. In response, it was said that the likely result would be that the notice was not valid (as would be the case in other defaults in notice provision under the Rules).

101. It was suggested that the term "appropriate measures" in proposed paragraph 6 bis (2) of the fourth proposal required further consideration. However, it was said that the proposal envisaged that ODR administrators would have the benefit of reasonable

flexibility under the Rules to determine which dispute resolution track would be offered at the final stage.

10. Summary of deliberations and decisions

102. A summary of the Working Group deliberations and decisions is found in Chapter III above.

B. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II)

(A/CN.9/WG.III/WP.130 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution ("ODR") relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] At its forty-fourth (Vienna, 27 June-8 July 2011),[2] forty-fifth (New York, 25 June-6 July 2012),[3] forty-sixth (Vienna, 8-26 July 2013)[4] and forty-seventh (New York, 7-19 July 2014)[5] sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the "Rules"), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions. From its twenty-third (New York, 23-27 May 2011) to twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group has considered the content of the draft Rules.

3. At its twenty-sixth session (Vienna, 5-9 November 2012), the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex). At its twenty-seventh session, the Working Group considered a proposal to implement a two-track system, one track of which would end in arbitration, and one track of which would not.

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

[4] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

[5] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), under preparation.

4. At its twenty-eighth (Vienna, 18-22 November 2013) and twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group proceeded to consider the draft text of the track of the Rules that did not end in a binding arbitration phase ("Track II").[6]

II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

5. At its twenty-ninth session, the Working Group affirmed its wish to ensure that the work it was undertaking took into account current ODR practice and possible future developments (A/CN.9/801, para. 14). It furthermore affirmed that due process, transparency, accountability and impartiality of the actors should form an integral part of the Rules (A/CN.9/801, para. 15). Support was also expressed for the principle of technological neutrality: in other words, that the Rules did not prescribe the type, functionality or methodology of the technology to be used in ODR proceedings (see A/CN.9/801, paras. 19, 21).

6. Moreover, a key point arising out of informal expert consultations with the Secretariat and reported to the Working Group at its twenty-ninth session was that (i) there was a great need to develop fair, transparent dispute resolution processes that would provide access to justice for the broadest spectrum of consumers; and at the same time that (ii) overly prescriptive Rules might hamper that aim by creating a system that was unworkable in practice (A/CN.9/801, para. 29).

7. The Working Group may wish to consider how the Rules — both Track I and Track II — could better incorporate principles of technological neutrality. The Working Group may also wish to consider further the usability of the Rules, and particularly whether the level of prescriptiveness in the Rules would be attractive to users, whilst at the same time balancing the desire to provide for accountability and transparency.

8. The Working Group may also wish to consider further streamlining and simplifying the Rules where appropriate. At its twenty-ninth session, the Working Group made some progress in this respect, agreeing to delete a provision on waiver of liability (formerly article 15: see A/CN.9/801, paras. 159-160) and streamlining the provision on language of proceedings (article 14; see A/CN.9/WG.III/WP.130/Add.1, paras. 4-5, and A/CN.9/801, para. 157). However, there remain provisions of Track II of the Rules that may be considered overly prescriptive both in terms of procedure as well as in confining technological implementation of the Rules.

Communications

9. One area in which the Rules might benefit from consideration as to whether technological neutrality could be improved is in relation to article 3 on communications. For example, at the request of the Working Group, a new definition of "designated electronic address" has been suggested in technologically neutral terms, which aim to encompass all types of electronic addresses (ODR platforms, parties' e-mail addresses, etc.) that might be used to exchange communications under the Rules. In practice, it is foreseeable that all communication, save perhaps the communication of the notice of the claim to the respondent, could be conducted over a platform rather than by e-mail notifications to the parties. The Working Group may wish to consider whether article 3 on communications, and provisions throughout the Rules, could better reflect that possibility (see also paras. 42 and 48-49 below).

ODR provider, ODR platform and ODR administrator

[6] A/CN.9/795, para. 21.

10. The Working Group considered at its twenty-eighth session whether the Rules accurately reflected the current practice of online dispute resolution in the definitions of the entities involved in the process (A/CN.9/795, para. 51).

11. At the twenty-ninth session of the Working Group, a view was expressed that centralizing the concept of ODR administration in a single term ("ODR administrator") would best capture both the diversity of existing practice as well as accommodate future developments in ODR systems (A/CN.9/801, para. 17).

12. At its twenty-eighth and twenty-ninth sessions, the Working Group further raised issues of liability in relation to the respective roles of ODR platform and provider. Specifically, views were expressed that it was important for the Rules to be clear as to which ODR entity (platforms, administrators, and so on) was responsible for which part of the ODR proceedings, and to whom (A/CN.9/795, para. 53; A/CN.9/801, para. 51). The Working Group may wish to consider whether it is the role of procedural rules to create obligations and clear lines of liability for the underlying entities, or whether the Rules ought rather to create a clear procedure addressed to end-users of the Rules.

13. The Working Group ultimately agreed at its twenty-ninth session to define both the term ODR administrator, as well as the term "ODR platform" in the Rules, and to delete all references in the Rules to an "ODR provider" (A/CN.9/801, paras. 52-54). Consequently references to an ODR provider have been replaced throughout the Rules with references to an ODR administrator. The Working Group furthermore decided that the dispute resolution clause ought to specify both the ODR administrator and the ODR platform (A/CN.9/801, para. 134; and see below, para. 15).

14. In light of the discussion at paragraphs 5-8 above, the Working Group may wish to consider whether such an approach sufficiently provides for technological neutrality and the evolution of ODR systems.

Model dispute resolution clause

15. At its twenty-ninth session, the Working Group considered including, as Annex to the Rules, a model dispute resolution clause; delegations were invited to consult with a view to agreeing on such a clause (A/CN.9/801, paras. 135-137). The Working Group has variously suggested that the dispute resolution clause ought to specify (i) both the ODR administrator and ODR platform (A/CN.9/801, para. 134; and above, para. 13); (ii) whether the proceedings are Track I or Track II (see article 1(1)(bis), and para. 31 below); (iii) the electronic address of the ODR platform (A/CN.9/801, para. 61); and (iv) the language of proceedings (A/CN.9/801, para. 150). It is suggested that the Working Group consider further the contents of online dispute resolution clauses for both arbitral and non-arbitral proceedings, and moreover, determine whether any other information ought to be included in article 13.

Legal effect of a recommendation under a Track II ODR proceeding

16. At its twenty-ninth session, the Working Group agreed that a recommendation as provided for in Track II was intended to have a non-binding effect (A/CN.9/801, para. 108).

17. The Working Group agreed that whilst there was nothing to prevent disputing parties from pursuing additional or concurrent judicial remedies alongside an ODR claim under Track II proceedings, that in the interests of transparency it might be advisable for parties to give notice of the initiation of any other proceedings at the outset of ODR proceedings (A/CN.9/801, paras. 23-26).

18. The Working Group at its twenty-ninth session also considered whether the parties could agree to be bound by a recommendation, and the legal effect of such an agreement in different jurisdictions. Specifically, differences of view were expressed in relation to whether an agreement to comply with a recommendation arising out of Track II proceedings would amount to a basis for initiating a claim, or for initiating enforcement proceedings in a national court (A/CN.9/801, paras. 103-104, 108). The

Working Group may wish to consider how the law governing such an agreement might be determined.

Guidelines

19. At its twenty-eighth session, the Working Group requested the Secretariat to draft preliminary guidelines that would indicate elements of the Rules better directed toward ODR providers and platforms than contained in procedural rules. Background and proposed content for those guidelines is contained in document A/CN.9/WG.III/WP.128, which may provide a useful reference point for assessing the Rules, and for determining whether any content currently in the Rules might be better placed in those guidelines.

20. The Working Group may wish to note that the Rules provide a procedural framework for the resolution of disputes between purchasers and merchants. The neutral and ODR administrator are part of that procedural framework, and consequently the rights and obligations of, and powers conferred on those entities as set out in the Rules, apply to those entities by virtue of their participation in the Rules-based process.

Timelines

21. The Working Group agreed at its twenty-ninth session to consider all timelines in the Rules holistically at the conclusion of its deliberations on Track II of the Rules (A/CN.9/801, paras. 165-166). The Working Group may wish to consider including a generic provision in the Rules that would ensure ODR proceedings would conclude within a certain amount of time, but that would give ODR administrators and/or neutrals flexibility within that time frame to set their own timelines for different stages of proceedings.

22. The Working Group may wish to recall in that respect that, subject to a decision made at its twenty-ninth session, a new article 12 has been inserted to require ODR administrators, or, where relevant, neutrals, to notify disputing parties of all deadlines under the Rules (see A/CN.9/801, para. 117; and A/CN.9/WG.III/WP.130/Add.1, para. 9).

B. Notes on draft procedural rules

23. The following preamble and articles 1-17 contained in this note and its addendum pertain only to Track II of the draft Rules.

1. Introductory rules

24. **Draft preamble**

"1. The UNCITRAL online dispute resolution rules (the 'Rules') are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.

"2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix]:

["(a) Guidelines and minimum requirements for online dispute resolution platforms/administrators;]

["(b) Guidelines and minimum requirements for neutrals;]

["(c) Substantive legal principles for resolving disputes;]

["(d) Cross-border enforcement mechanism;]

["...];"

Remarks

General

25. The Working Group did not consider the draft preamble at its twenty-ninth session. The Working Group may wish to consider whether the Rules would be functional without the documents referred to in paragraph (2) of the preamble. As the legal nature, and addressees, of the Rules differ from those of the ancillary documents listed in paragraph (2), it might be advisable not to attach the documents currently listed in paragraph (2) as an Appendix to the Rules (see A/CN.9/WG.III/WP.127, para. 28, A/CN.9/WG.III/WP.127/Add.1, para. 10 and A/CN.9/WG.III/WP.128, para. 8).

26. **Draft article 1 (Scope of application)**

"1. The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

"1 bis. Explicit agreement referred to in paragraph 1 requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under the Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause').

"2. These Rules shall only apply to claims:

"(a) that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the sales or service contract referred to in paragraph 1; or

"(b) that full payment was not received for goods or services provided.

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

Remarks

General

27. The Rules do not currently set out a time frame in which a claim may be brought, and indeed it may be for the ODR administrator to set such a limitation period. However the Working Group may also wish to consider whether to include a time period in article 1, in order to link the time for bringing an online claim to (i) a certain time after the goods or services have been paid for or delivered; or (ii) a certain time after the alleged breach.[7] In the alternative, guidelines might set out a suggested period in which claims could be brought in the online system (see A/CN.9/WG.III/WP.127, para. 30).

28. Although procedural rules would typically not prescribe a limitation period, but would rather rely on national law to do so, the Working Group may wish to consider whether the Rules or guidelines should prescribe such a period in order to provide for procedural clarity for parties as well as ODR administrators. Such a period would not affect or override any period for bringing claims specified in national law (see A/CN.9/WG.III/WP.127, para. 31).

Paragraph (1)

29. At its twenty-ninth session, the Working Group agreed to replace the phrase "transaction conducted by use of electronic communications" with the phrase "sales or service contract concluded using electronic communications". The Working Group

[7] The United Nations Convention on the Limitation Period in the International Sale of Goods (1974), which does not apply to sales of goods for personal or household use, sets out principles for prescription periods based on the date on which the claim accrues (article 9).

may wish to consider in more detail the implications of including service contracts within the scope of the Rules.

Paragraph (1)(bis)

30. At its twenty-ninth session, the Working Group agreed that paragraph (1)(bis) would be amended to read as follows: "Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause')" (A/CN.9/801, para. 44). The Working Group may wish to note that the word "above" has been deleted from the first sentence of that proposal as inconsistent with the drafting style in other provisions. Furthermore, the term "the Rules" has been substituted for "these Rules" in the second sentence, for the purpose of achieving internal consistency within the paragraph.

31. In relation to the phrase "and whether Track I or Track II of the Rules apply to that dispute", the Working Group may wish to consider this language in the context of its consideration of a model dispute resolution clause (see above, para. 15).

Paragraph (2)

32. The Working Group agreed at its twenty-eighth session that the Rules ought to include an exhaustive list of the type of claims that may be brought and that the phrase "[made] at the time of the transaction" at the end of subparagraph (a) ought to be deleted as restricting excessively the basis on which a claim may be brought (A/CN.9/795, para. 41). That language, with modifications, was re-inserted by the Secretariat ("in conformity with the agreement made at the time of transaction") to accord more closely with the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") (A/CN.9/WG.III/WP.127, para. 33), and pursuant to the request of the Working Group to replace the phrase "in accordance with the agreement" (A/CN.9/795, para. 42). However the words "[made] at the time of the transaction" at the end of that phrase have been deleted from that phrase at the request of the Working Group (A/CN.9/801, para. 45).

33. Paragraph (2) has consequently been amended to refer to "the sales or service contract referred to in paragraph 1", rather than to "the agreement", in order to clarify the contract to which paragraph (2) refers.

34. The Working Group may wish to have regard to the discussion in relation to the CISG, which does not apply to consumer contracts, but in relation to which it might wish to retain consistency in the Rules (see A/CN.9/WG.III/WP.127, paras. 33-36).

35. Specifically, the Working Group may wish to consider whether a similar approach to that set out in articles 31, and 54-60 of the CISG ought to be taken in relation to paragraph (2). In that respect, the Working Group may wish to consider amending paragraph (2)(a) as follows: "that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, not provided in conformity with the agreement [made at the time of transaction], and/or that documents related to the goods were not provided"; and amending paragraph (2)(b) as follows "that full payment was not received for goods or services provided and/or the purchaser did not take delivery of the goods".

36. **Draft article 2 (Definitions)**

"For purposes of these Rules:

ODR

"1. 'ODR' means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

"2. 'ODR administrator' means the entity [specified in the dispute resolution clause] that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform.

"3. 'ODR platform' means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules.

Parties

"4. 'Claimant' means any party initiating ODR proceedings under the Rules by issuing a notice.

"5. 'Respondent' means any party to whom the notice is directed.

Neutral

"6. 'Neutral' means an individual that assists the parties in settling or resolving the dispute.

Communication

"7. 'Communication' means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.

"8. '[Designated] electronic address' means an information system, or portion thereof, [designated] by the parties to the online dispute resolution process to exchange communications related to that process."

Remarks

Paragraphs (2) and (3)

37. At its twenty-ninth session, the Working Group agreed to include definitions of the terms "ODR administrator" and "ODR platform" in the Rules (A/CN.9/801, paras. 49-54).

38. In relation to paragraph (2), a suggestion was made at the twenty-ninth session of the Working Group to create a link between the definition of an ODR administrator, and draft article 13 of the Rules, which specified the entity to be named in the dispute resolution clause. Specific wording in relation to that paragraph was proposed as follows "'ODR administrator' means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform, and which is specified in the dispute resolution clause" (A/CN.9/801, para. 53).

39. Slightly different wording has been proposed in paragraph 36 above in order to enhance clarity of drafting. In addition, the Working Group may wish to consider whether an explicit link to the dispute resolution clause is necessary or desirable in this provision, the purpose of which is to provide a definition of an ODR administrator in the context of the Rules. Article 13 sets out a discrete requirement for the contents of the dispute resolution clause (see also above, para. 15).

Paragraph (4)

40. The Working Group may wish to consider deleting the phrase "by issuing a notice", in order to preserve, to the extent possible, the stand-alone nature of definitions in article 2.

Paragraph (7)

41. At its twenty-ninth session the Working Group agreed to simplify the definition of "communication" so that it would both (i) be defined as broadly as possible to capture any form of communication that may take place under the Rules; and (ii) ensure that all communication under the Rules would be electronic in form (A/CN.9/801, para. 56; see also A/CN.9/WG.III/WP.127, para. 44). The definition

agreed upon at that session, as contained in paragraph (7) of article 2, also conforms with the definitions of communication and electronic communication in the United Nations Convention on the Use of Electronic Communications in International Contracts ("Electronic Communications Convention"). The phrase "for the purposes of these Rules" has been deleted as redundant with the chapeau.

Paragraph (8)

42. The Working Group agreed at its twenty-ninth session that the Rules ought to contain a definition of the term "electronic address" or "designated electronic address" (A/CN.9/801, paras. 57-59), taking into account existing usage in UNCITRAL texts. Although neither the Electronic Communications Convention nor other standards such as the ICC Uniform Customs and Practice for Documentary Credits for Electronic Presentation (also known as eUCP) define the notion of "electronic address", in those standards the underlying understanding is that that term refers to an information system (as defined in article 2(f) of the UNCITRAL Model Law on Electronic Commerce) or portion thereof used by a party. A definition of "designated electronic address" has been inserted in article 2 that is intended to provide a technologically neutral manner of expressing this concept in the context of the Rules. In relation to the retention of the word "designated", see paragraphs 46, and 56-57 below.

43. **Draft article 3 (Communications)**

"1. All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform shall be designated in the dispute resolution clause. Each party shall [designate][provide the ODR administrator with] [a designated] electronic address.

"2. A communication shall be deemed to have been received when, following communication to the ODR administrator in accordance with paragraph 1, the ODR administrator notifies the parties of the availability thereof in accordance with paragraph 4. [The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.]

"3. The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral [at their electronic addresses].

"4. The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform.

"5. The ODR administrator shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the recommendation stage of proceedings."

Remarks

Paragraph (1)

44. The Working Group may wish to consider the mechanism set out in paragraph (1) further, and specifically, whether the intention is that communications are sent "… to the ODR administrator" or simply that all communications are sent "via the ODR platform". If the former, the Working Group may wish to clarify further the intended role of an administrator and whether the existing language in the Rules is sufficiently technologically neutral and best accommodates the respective roles of platform and administrator.

45. The second sentence of paragraph (1) has been slightly modified to improve clarity of drafting. Without the modifications, second sentence of paragraph (1) would

have read as follows: “The electronic address of the ODR platform to which documents must be submitted shall be specified in the dispute resolution clause.”

46. At its twenty-ninth session, the Working Group requested that the following sentence be added to the end of paragraph (1): “Each party shall provide the ODR administrator with an electronic address to be used for communications” (A/CN.9/801, paras. 61, 62 and 64). It was said that such an insertion would enable the deletion of two paragraphs and result in a more streamlined draft article 3. Specifically, it was said that that language would accommodate the parties’ ability to provide updated electronic addresses throughout the proceedings. The Working Group might wish to consider in this respect: (i) the different types of address that might be designated for the purpose (e.g. an inbox on the platform itself; an e-mail address, etc.), the term “designated electronic address” providing a technologically neutral term that ought to provide for such different types of address; and (ii) that when considering the time at which an electronic address needs to be first designated, a respondent can only receive the notice if it has designated its electronic address before proceedings have commenced. The Working Group might also wish to consider whether the ability of parties to provide updated designated electronic addresses might be made explicit in the Rules.

47. In addition, alternative language has been proposed in relation to the last sentence of paragraph (1), to make clearer the fact that when a party provides an electronic address, in fact it is designating the electronic address to be used for communications under the Rules.

Paragraph (2)

48. Paragraph (2) introduces a deeming rule on the time of receipt of the electronic communications. The current text of draft paragraph (2) refers to “notification of the availability of the communication”. The Working Group may wish to consider how this might work in practice. For example, should the designated electronic address of one of the parties be part of the same information system as ODR platform itself, (in other words, an “inbox” on the platform), under article (2), the communication and notification of its availability would in practice be sent to the same designated electronic address. If the Working Group intends that a notification is sent to a different designated electronic address, the text as drafted does not make that clear.

49. Consequent to those concerns, proposed text based on Article 10 of the Electronic Communications Convention has been included in square brackets. Although the Working Group decided at its twenty-fifth session to delete similar language (A/CN.9/744, para. 73; see also A/CN.9/WG.III/WP.119, paras. 50-52), it is proposed that it might wish to reconsider inserting such language, which may better protect the recipient in cases in which the communication has been sent, but may not be retrieved by the addressee due to reasons outside its control (e.g., firewalls, spam filters, viruses, etc.). Moreover such language would obviate the need to have a deemed receipt for two different communications — the communication proper and the notification of the communication. In other words, only one communication would be sent and it would be deemed received when it is possible for the recipient to retrieve it.

Paragraph (3)

50. Paragraph (3) has been redrafted according to a decision of the Working Group at its twenty-ninth session (A/CN.9/801, para. 66). The words “at their electronic addresses” have been placed in square brackets pending further discussion of the definition of designated electronic address and of the intended process of receipt of communications and an additional notification of such receipt (see paras. 48-49 above).

Paragraph (5)

51. The Working Group may wish to consider, in light of its decision at its twenty-ninth session to include a general provision in the Rules to reflect that the

neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings (A/CN.9/801, para. 117), inserted as article 12, whether paragraph (5) remains necessary.

2. Commencement

52. Draft article 4A (Notice)

"1. The claimant shall communicate to the ODR administrator a notice in accordance with paragraph 4.

"2. The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.

"3. ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph 1, the ODR administrator notifies the parties of the availability of the notice at the ODR platform.

"4. The notice shall include:

"(a) the name and [designated] electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

"(b) the name and [designated] electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

"(c) the grounds on which the claim is made;

"(d) any solutions proposed to resolve the dispute;

"(e) the location of the claimant;

"(f) the claimant's preferred language of proceedings;

"(g) the signature or other means of identification and authentication of the claimant and/or the claimant's representative.

"5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim, and also information in relation to the pursuit of other legal remedies."

Remarks

General

53. At its twenty-ninth session, the Working Group made a number of amendments in relation to article 4A. Notably, the Working Group suggested that initiating ODR proceedings under Track II of the Rules was not a bar to initiating concurrent judicial proceedings. However, the Working Group agreed that the Rules should provide that a disputing party ought to notify the other disputing party if it was pursuing other legal remedies (para. (5)) (see A/CN.9/801, paras. 23-26, 78, 83, 157).

54. In line with its decision to delete the term "ODR provider", that phrase has been replaced in article 4A with the term "ODR administrator".

55. The phrase "the form contained in", which referred to the information for inclusion in the notice set out in paragraph (4), has been deleted in paragraph (1) to improve clarity of drafting.

Paragraph (4)

Designated electronic address

56. At its twenty-ninth session, the Working Group requested the deletion of the word "designated" before "electronic address" in paragraphs (a) and (b). The term has been retained in paragraph (a) in square brackets to indicate that if a claimant provides an electronic address it is in practice designating one. However, the Working

Group may wish to consider whether the designation of an electronic address should be explicitly provided for in this article, when the presumptive intention is that an electronic address must be designated (at least on the part of the respondent) prior to the commencement of proceedings, and may be updated (by any party) at any time (see above, para. 46).

57. In relation subparagraph (b), the term has likewise been retained but the Working Group may wish to consider further the inclusion of the term "[designated] electronic address", or even simply to which electronic address the claimant ought to refer; in particular, the Working Group may wish to consider whether a statement by the claimant under subparagraph (b) in the notice would amount to the designation of the electronic address of the respondent, and whether such designation would be desirable (see also below, para. 61).

Location of the claimant

58. The Working Group may wish to consider whether "the location of the claimant" in paragraph (4)(e) is a useful metric; and if so, whether the term "location" accurately serves the purpose it aims to achieve.

59. **Draft article 4B (Response)**

"1. The respondent shall communicate to the ODR administrator a response to the notice in accordance with paragraph 2 within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform.

"2. The response shall include:

"(a) the name and [designated] electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

"(b) a response to the grounds on which the claim is made;

"(c) any solutions proposed to resolve the dispute;

"(d) the location of the respondent;

"(e) whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(f), or whether another language of proceedings is preferred;

"(f) the signature or other means of identification and authentication of the respondent and/or the respondent's representative.

"3. The respondent may provide, at the time it submits its response, any other relevant information, including information in support of its response, and also information in relation to the pursuit of other legal remedies."

Remarks

General

60. Consequential changes reflecting the modifications to draft article 4A have been made in draft article 4B (A/CN.9/801, para. 85).

Paragraph (2)

61. In relation to subparagraph (a), the word "designated" has been placed in square brackets. In relation to the designation of an electronic address of a respondent, the Working Group may wish to consider the desirability that, as set out in paragraph 46 above, a respondent can only receive the notice if it has designated its electronic address before proceedings have commenced (see also para. 57 above).

62. **Draft article 4C (Counterclaim)**

"1. The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise out

of the same transaction as the claimant's claim. A counterclaim shall include the information in article 4A, paragraphs (4)(c) and (d).

"2. The claimant may respond to any counterclaim within [seven (7)] calendar days of being notified of the existence of the response and counterclaim on the ODR platform. A response to the counterclaim must include the information in article 4B, paragraphs (4)(b) and (c)."

Remarks

63. At its twenty-ninth session, the Working Group agreed to retain draft article 4C as set out in paragraph 62 above.

3. Negotiation

64. **Draft article 5 (Negotiation)**

Commencement of the negotiation stage

"1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR administrator, and notification thereof to the claimant. If the response include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph 2, whichever is earlier.

"2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.

Commencement of the facilitated settlement stage

"3. If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 2 within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence.

"4. If the parties have not settled their dispute by negotiation within ten (10) calendar days of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.

Extension of time

"5. The parties may agree to a one-time extension of the deadline for reaching settlement. However no such extension shall be for more than ten (10) calendar days."

Remarks

65. At its twenty-ninth session, the Working Group agreed that guidelines to the Rules ought to indicate, in relation to a negotiation stage, that an ODR administrator should give a description to parties of what types of technical programmes would be used and the way negotiation would be conducted (A/CN.9/801, paras. 88-89).

4. Facilitated settlement

66. **Draft article 6 (Facilitated settlement)**

"1. Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)].

"2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.

"3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the 'expiry of the facilitated settlement stage'), the final stage of proceedings shall commence pursuant to article 7 (Recommendation by a neutral)."

Remarks

Paragraph (1)

67. At its twenty-ninth session, the Working Group requested the Secretariat to insert language in draft article 6 to ensure that the ODR administrator would be required to give notice to the disputing parties of the ten-day deadline specified in paragraph (3) (A/CN.9/801, para. 92). That language has been inserted in paragraph (1) in square brackets.

68. The Working Group also requested that the Secretariat insert a generic provision to reflect that neutral or ODR administrator should notify all parties of all relevant deadlines during proceedings (A/CN.9/801, para. 117). In light of that provision, inserted as a new article 12, the Working Group may wish to consider whether including specific language in paragraph (1) to this effect is necessary or desirable.

5. Recommendation

69. **Draft article 7 (Recommendation by a neutral)**

"1. At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

"2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.

"3. The neutral shall, within fifteen (15) calendar days of the expiry of the facilitated settlement stage, evaluate the dispute based on the information submitted by the parties, and having regard to the terms of the agreement, shall make a recommendation in relation to the resolution of the dispute. The ODR administrator shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.

Option 1

"4. The recommendation shall not be binding on the parties unless they otherwise agree. [However, the parties are encouraged to abide by the recommendation and the ODR administrator may introduce the use of trustmarks or other methods to identify compliance with recommendations.]"

Option 2

"4. The recommendation shall not be binding on the parties. However, a party or both parties may commit to comply with the recommendation. The ODR administrator may introduce mechanisms to encourage compliance with the recommendation."

Remarks

Paragraph (4)

70. At its twenty-ninth session, the Working Group agreed that the recommendation provided for in article 7 of Track II proceedings (Recommendation by a neutral) was not intended to have a binding effect (A/CN.9/801, para. 108; see also A/CN.9/769, para. 56). The Working Group expressed differing views at that session as to the legal

nature of an agreement by parties to a dispute to comply with a recommendation, and also of the desirability and timing of such an agreement (A/CN.9/801, paras. 95-108).

71. At its twenty-ninth session, the Working Group agreed to include two options in relation to paragraph (4).

72. The Working Group may wish to consider whether providing instructions as to what an ODR administrator may or may not do to encourage compliance is helpful or necessary in the context of procedural rules, or whether that guidance could be better placed in guidelines (see also A/CN.9/WG.III/WP.127, para 87; A/CN.9/WG.III/WP.128, para. 47). It may further wish to consider, in relation to option 2, whether the term "commit[ment] to comply" is sufficiently clear in legal or procedural terms. In any event, the Working Group may wish to recall that it left the matter of whether "mechanisms" in relation to compliance ought to be addressed in the Rules open for further consideration (A/CN.9/801, para. 108).

6. Settlement

73. **Draft article 8 (Settlement)**

"If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate."

Remarks

General

74. Pursuant to the decision of the Working Group that settlement ought to be provided for at any time during ODR proceedings, a discrete provision on settlement has been included in draft article 8 (A/CN.9/795, para. 121-122; A/CN.9/801, para. 108).

(A/CN.9/WG.III/WP.130/Add.1) (Original: English)
Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II)

ADDENDUM

Contents

II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

B. Notes on draft procedural rules

7. Neutral

1. **Draft article 9 (Appointment of neutral)**

"1. The ODR administrator shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR administrator shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

"2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules.

"3. The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the ODR administrator. The ODR administrator shall promptly communicate such information to the parties.

Objections to the appointment of a neutral

"4. Either party may object to the neutral's appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

"5. Where a party objects to the appointment of a neutral under paragraph 4(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR administrator will be final, subject to paragraph 4(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph 4(ii).

"6. Where a party objects to the appointment of a neutral under paragraph 4(ii), the ODR administrator shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

"7. In the event both parties object to the appointment of a neutral under paragraph 4(i) or 4(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator, notwithstanding the number of challenges that has been made by either party.

Objections to provision of information

"8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR administrator to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR administrator shall convey the full set of existing information on the ODR platform to the neutral.

Number of neutrals

"9. The number of neutrals shall be one."

Remarks

General

2. The Working Group will recall that it has consistently agreed that the deadlines throughout the Rules would be considered in their entirety at a later stage (A/CN.9/801, paras. 111, 165-166). A view was also expressed at the twenty-ninth session of the Working Group that article 9 could be further streamlined, particularly in relation to deadlines specified (A/CN.9/801, para. 111).

Paragraph (1)

3. At its twenty-ninth session, the Working Group agreed to consider further the matter of how to enunciate in the Rules the types of information that ought to be provided to disputing parties in relation to the neutral (A/CN.9/801, para. 114).

4. **Draft article 10 (Resignation or replacement of neutral)**

"If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR administrator shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions."

5. At its twenty-ninth session, the Working Group agreed to retain article 10 as set out in paragraph 4 above (A/CN.9/801, para. 119). The phrase "ODR administrator" has been inserted in lieu of the phrase "ODR provider through the ODR platform", to indicate the entity that shall appoint a replacement neutral.

6. **Draft article 11 (Power of the neutral)**

"1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.

"1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.

"2. Subject to any objections under article 9, paragraph 8, the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings.

"3. At any time during the proceedings the neutral may request or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine)

to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.

"4. The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules."

Remarks

7. At its twenty-ninth session, the Working Group agreed to delete a *competence-competence* provision in relation to neutrals in draft article 11, on the basis that such provision would not be appropriate for simple, streamlined Rules (A/CN.9/801, para. 128).

General

Paragraph (4)

8. At its twenty-ninth session, the Working Group agreed to move the following sentence from article 3(4) to article 11: "The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform" (A/CN.9/801, paras. 65, 129). The Working Group agreed to modify that sentence and paragraph (4) reflects those modifications (see A/CN.9/801, para. 131).

8. General provisions

9. Draft article 12 — Deadlines

"The ODR administrator, or, if relevant, the neutral, shall notify parties of all relevant deadlines during the course of proceedings."

Remarks

10. At its twenty-ninth session, the Working Group requested the Secretariat to insert a general provision in the Rules to reflect that the neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings (A/CN.9/801, para. 117). Article 12 has been inserted in this regard. It is notable that while a neutral might retain some discretion to set or notify parties of deadlines, the ODR administrator would have to fulfil that function prior to the appointment of such a neutral.

11. Draft article 13 (Dispute resolution clause)

"The ODR platform and ODR administrator shall be specified in the dispute resolution clause."

Remarks

12. The Working Group considered at its twenty-ninth session that for reasons of transparency and accountability, both the ODR platform and ODR administrator ought to be specified in the dispute resolution clause (A/CN.9/801, para. 134). The title of draft article 13 has been modified (formerly "ODR provider") to reflect this change.

13. In addition, the Working Group considered that a model dispute resolution clause might be annexed to the Rules. The Working Group was invited to consult with a view to agreeing upon a model dispute resolution clause which could be considered at a later stage (A/CN.9/801, paras. 135-137; and A/CN.9/WG.III/WP.130, para. 15).

14. The Working Group may wish to consider how prescriptive a dispute resolution clause ought to be, and in particular, whether such an approach is sufficiently technologically neutral (see A/CN.9/WG.III/WP.130, paras. 5-8; 15).

15. Draft article 14 (Language of proceedings)

"The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)][the offer for ODR

proceedings accepted by the buyer]. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select."

Remarks

16. At its twenty-ninth session, the Working Group amended and streamlined the provision in the Rules addressing language of proceedings (A/CN.9/801, para. 157). One amendment introduced the phrase "the offer for ODR proceedings accepted by the buyer"; but because what constitutes offer and acceptance of ODR proceedings have not been defined in the Rules, such a phrase introduces a lack of clarity and an increased complexity, raising questions such as when an offer for proceedings has been made, and when acceptance has been proffered. Moreover, the term "buyer" has not been used in the Rules and lacks consistency with other provisions. The Working Group may consequently wish to consider alternative language, such as: "The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)] …", inserted in square brackets as an alternative.

17. **Draft article 15 (Representation)**

"A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR administrator."

Remarks

18. The Working Group agreed at its twenty-ninth session to retain the Rules' provision on representation as set out in paragraph 17 above. The Working Group may wish to consider whether representation is necessary or appropriate, particularly in Track II proceedings.

19. **Draft article 16 (Costs)**

"The neutral shall make no decision as to costs and each party shall bear its own costs."

Remarks

20. Draft article 16 reflects a principle often seen in arbitration proceedings, whereby the Rules prevent a neutral from awarding the costs incurred in proceedings by the successful disputing party to be paid by the unsuccessful disputing party. The Working Group recorded consensus at its twenty-ninth session that the "winning" party in ODR proceedings ought not to be able to reclaim its costs from the losing party (A/CN.9/801, para. 163).

21. However, the Working Group may wish to consider whether a costs provision reflecting such a principle is necessary in Track II proceedings.

22. **Draft article 17 (Fees of ODR proceedings)**

"The fees of ODR proceedings shall be reasonable in amount, and communicated to the parties in advance of proceedings."

Remarks

23. At its twenty-ninth session, the Working Group agreed that the Rules could address in a new provision the need for fees levied by ODR administrators or platforms to be reasonable (A/CN.9/801, para. 164).

24. The Working Group may wish to note that the UNCITRAL Arbitration Rules as revised in 2010 contain a detailed provision on fees and expenses of arbitrators. However, the new draft article 17 in paragraph 22 above specifically avoids referring to the fees charged by a specific ODR entity (administrator, platform or neutral), in order to retain both technological neutrality as well as flexibility of practice in general.

C. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)

(A/CN.9/WG.III/WP.131)

[Original: English]

Contents

I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution ("ODR") relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] At its forty-fourth (Vienna, 27 June-8 July 2011),[2] forty-fifth (New York, 25 June-6 July 2012), [3] forty-sixth (Vienna, 8-26 July 2013) [4] and forty-seventh (New York, 7-19 July 2014)[5] sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the "Rules"), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions. From its twenty-third (New York, 23-27 May 2011) to twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group has considered the content of the draft Rules.

3. At its twenty-sixth session (Vienna, 5-9 November 2012), the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute are considered binding on consumers, as well as jurisdictions where pre-dispute

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

[4] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

[5] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), under preparation.

arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex). At its twenty-seventh session, the Working Group considered a proposal to implement a two-track system, one track of which would end in arbitration, and one track of which would not.

4. At its twenty-seventh session (New York, 20-24 May 2013), the Working Group considered the draft text of the track of the Rules that ended in a binding arbitration phase ("Track I"), as contained in document A/CN.9/WG.III/WP.119 and its addendum. The iteration of Track I of the Rules further to those discussions (see the report of that session: A/CN.9/769) is set out in document A/CN.9/WG.III/WP.123, which has not yet been considered by the Working Group.

5. At its twenty-eighth (Vienna, 18-22 November 2013) and twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group proceeded to consider the draft text of the track of the Rules that did not end in a binding arbitration phase ("Track II"). The draft text considered by the Working Group at those sessions can be found in document A/CN.9/WG.III/WP.123/Add.1, and document A/CN.9/WG.III/WP.127 and its addendum, respectively.

6. At its forty-seventh session, the Commission agreed that the Working Group should at its thirtieth session address the text of Track I of the Rules, as well as the issues identified in paragraph 222 of the report of the forty-sixth session of the Commission, [6] some of which were further addressed in document A/CN.9/WG.III/WP.125, a proposal by the Governments of Colombia, Honduras, Kenya and the United States, and should continue to achieve practical solutions to open questions.[7]

7. This note sets out the text of Track I of the Rules. Various drafting and structural changes have been incorporated in this note in order to align the draft of Track I as set out in document A/CN.9/WG.III/WP.123 with changes made to Track II over the course of the previous two sessions of the Working Group. These changes are not substantive but rather align order of provisions, definitions and phrasing with that agreed by the Working Group in relation to the draft text of Track II. Square brackets have been removed when they have been removed in relation to Track II, and have been retained where they pertained only to a provision in relation to Track I proceedings. The changes made are intended to provide the Working Group with a basis for discussion that does not require revisiting non-substantive drafting changes. In order to assist the Working Group, reference is made by article in this note to the most recent commentary, drawn from discussions on Track I as well as Track II, where relevant, in relation to that article.

II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

8. From a more substantive perspective, the Working Group may wish to consider the extent to which Track I can or ought to reflect the same provisions as Track II, diverging only at the final stage of proceedings. This might be desirable in relation to the implementation of both Track I and Track II proceedings by ODR administrators.

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17).
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), under preparation.

B. Notes on draft procedural rules

1. Introductory rules

9. **Draft preamble**

"*1. The UNCITRAL online dispute resolution rules (the "Rules") are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.*

"*2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix]:*

[(a) Guidelines and minimum requirements for online dispute resolution platforms/administrators;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[…]."

Remarks

10. The preamble reflects all changes made to the preamble pursuant to discussions in relation to Track II proceedings. Recent relevant commentary can be found in document A/CN.9/WG.III/WP.127, paragraphs 24-28.

11. **Draft article 1 (Scope of application)**

"*1. The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.*

[*"1a. These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen.*"*]*

"*1 bis. Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be exclusively resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the "dispute resolution clause").*"

"*2. These Rules shall only apply to claims:*

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the sales or service contract referred to in paragraph 1; or

(b) That full payment was not received for goods or services provided.

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

Remarks

12. Article 1 as set out in paragraph 11 above reflects a number of changes made pursuant to discussions in relation to Track II proceedings; the only provision that differs from Track II proceedings is paragraph 1a and its heading, which pertain only to Track I. Recent relevant commentary can be found in document A/CN.9/WG.III/WP.123, paragraphs 14-18; and A/CN.9/WG.III/WP.130, paragraphs 27-35.

13. **Draft article 2 (Definitions)**

"*For purposes of these Rules:*

ODR

"*1. 'ODR' means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.*

"*2. 'ODR administrator' means the entity [specified in the dispute resolution clause] that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform.*

"*3. 'ODR platform' means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules.*

Parties

"*4. 'Claimant' means any party initiating ODR proceedings under the Rules by issuing a notice.*

"*5. 'Respondent' means any party to whom the notice is directed.*

[TBD]

["*5a. 'Consumer' means a natural person who is acting primarily for personal, family or household purposes.]*

Neutral

"*6. 'Neutral' means an individual that assists the parties in settling or resolving the dispute.*

Communication

"*7. 'Communication' means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.*

"*8. '[Designated] electronic address' means an information system, or portion thereof, [designated] by the parties to the online dispute resolution process to exchange communications related to that process.*"

Remarks

14. Article 2 as set out in paragraph 13 above reflects the modifications made pursuant to discussions in relation to Track II proceedings; the only provision that differs from Track II proceedings is paragraph 5a and its heading, which pertain only to Track I. Recent relevant commentary can be found in document A/CN.9/WG.III/WP.123, paragraphs 20-21; and A/CN.9/WG.III/WP.130, paragraphs 37-42.

15. **Draft article 3 (Communications)**

"*1. All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform shall be designated in the dispute resolution clause. Each party shall [designate] [provide the ODR administrator with] [a designated] electronic address.*

"*2. A communication shall be deemed to have been received when, following communication to the ODR administrator in accordance with paragraph 1, the ODR administrator notifies the parties of the availability thereof in accordance with paragraph 4. [The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.]*

"*3. The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral [at their electronic addresses].*

"*4. The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform.*

"*5. The ODR administrator shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the arbitration stage of proceedings.*"

Remarks

16. Save for paragraph (5), which refers to an arbitration stage of proceedings rather than the recommendation stage of proceedings, article 3 as set out in paragraph 15 above reflects all changes made pursuant to discussions in relation to Track II proceedings. Relevant commentary can be found in document A/CN.9/WG.III/WP.130, paragraphs 44-51; and in A/CN.9/WG.III/WP.123, paragraph 26.

2. Commencement

17. **Draft article 4A (Notice)**

"*1. The claimant shall communicate to the ODR administrator a notice in accordance with paragraph 4. [The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.]*

"*2. The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.*

"*3. ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph 1, the ODR administrator notifies the parties of the availability of the notice at the ODR platform.*

"*4. The notice shall include:*

"*(a) The name and [designated] electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;*

"*(b) The name and [designated] electronic address of the respondent and of the respondent's representative (if any) known to the claimant;*

"*(c) The grounds on which the claim is made;*

"*(d) Any solutions proposed to resolve the dispute;*

["*(e) A statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;]*

["*(f) The location of the claimant];*

"*(g) The claimant's preferred language of proceedings;*

"*(h) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.*

["*5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim, and also information in relation to the pursuit of other legal remedies.*"]

Remarks

18. Article 4A as set out in paragraph 17 above reflects a number of changes made pursuant to discussions in relation to Track II proceedings. Relevant commentary can be found in document A/CN.9/WG.III/WP.119, paragraphs 54-61; and A/CN.9/WG.III/WP.130, paragraphs 53-58.

19. The Working Group may wish to note that paragraph (5) has been inserted in square brackets for its consideration, and reflects a modification made to article 4A in Track II proceedings. Should the Working Group determine that paragraph (5) ought to be retained, it is suggested to delete the second sentence of paragraph (1) as redundant. In any event, the inclusion of subparagraph (e) and the intended legal consequences of that subparagraph might warrant additional consideration by the Working Group; a similar provision was deleted in respect of Track II proceedings.

20. **Draft article 4B (Response)**

"*1. The respondent shall communicate to the ODR administrator a response to the notice in accordance with paragraph 2 within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform. [The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.]*

"*2. The response shall include:*

"*(a) The name and [designated] electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;*

"*(b) A response to the grounds on which the claim is made;*

"*(c) Any solutions proposed to resolve the dispute;*

"[*(d) A statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;]*

"*[(e) The location of the respondent;]*

"*[(f) Whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]*

"*[(g) the signature or other means of identification and authentication of the respondent and/or the respondent's representative.]*

["*3. The respondent may provide, at the time it submits its notice, any other relevant information, including information in support of its response, and also information in relation to the pursuit of other legal remedies.*"]

Remarks

21. Article 4B as set out in paragraph 20 above reflects a number of changes made pursuant to discussions in relation to Track II proceedings. Relevant commentary can be found in document A/CN.9/WG.III/WP.119, paragraphs 63-69; A/CN.9/WG.III/WP.123, paragraph 29; and A/CN.9/WG.III/WP.130, paragraph 60.

22. A new paragraph (3) has been inserted in square brackets, and reflects a modification made to article 4B in Track II proceedings. Similar to the discussion set out in paragraph 19 above, the Working Group might wish to review this provision having regard also to the second sentence of paragraph (1) and paragraph (2)(d).

23. [**Draft article 4C (Counterclaim)**

"*1. The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise out*

of the same transaction as the claimant's claim. A counterclaim shall include the information in article 4A, paragraphs (4)(c) and (d).

"*2. The claimant may respond to any counterclaim within [seven (7)] calendar days of being notified of the existence of the response and counterclaim on the ODR platform. A response to the counterclaim must include the information in article 4B, paragraphs (4)(b) and (c).*"]

Remarks

24. Relevant commentary in relation to article 4C can be found in document A/CN.9/WG.III/WP.127, paragraphs 68-69; and A/CN.9/WG.III/WP.130, paragraph 63. A counterclaim provision has not been considered by the Working Group in the context of Track I proceedings.

3. Negotiation

25. **Draft article 5 (Negotiation)**

Commencement of the negotiation stage

"1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR administrator, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph 2, whichever is earlier.

"2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.

Commencement of the facilitated settlement stage

"3. If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence.

"4. If the parties have not settled their dispute by negotiation within ten (10) calendar days of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.

Extension of time

"5. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days."

Remarks

26. Save for the square brackets in paragraph (5), which have yet to be considered in relation to Track I proceedings, article 5 as set out in paragraph 25 above reflects all changes made pursuant to discussions in relation to Track II proceedings. Relevant commentary can be found in documents A/CN.9/WG.III/WP.123, paragraphs 31-34; A/CN.9/WG.III/WP.127, paragraphs 71-76; and A/CN.9/WG.III/WP.130, paragraph 65.

27. In relation to paragraph (5), the Working Group may wish to recall that in Track II proceedings, it retained the phrase "for reaching settlement" and deleted the phrase "for the filing of the response". It is suggested that a similar approach could be adopted in Track I.

4. Facilitated settlement

28. Draft article 6 (Facilitated settlement)

"1. Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)].

"2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.

"3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the 'expiry of the facilitated settlement stage'), the ODR proceedings shall move to the final stage of proceedings pursuant to article 7, and the ODR administrator shall promptly notify the parties pursuant to article 3(5) that they have moved from the consensual stage of proceedings to the binding arbitration stage."

Remarks

29. Save for paragraph (3), article 6 as set out in paragraph 28 above (formerly article 8) reflects all changes made pursuant to discussions in relation to Track II proceedings. Relevant commentary can be found in documents A/CN.9/WG.III/WP.127, paragraphs 78-81; and A/CN.9/WG.III/WP.130, paragraphs 67-68; and in relation to paragraph (3), in document A/CN.9/WP.123, paragraph 51.

5. Arbitration

30. Draft article 7 (Arbitration)

"1. At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

"2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.

"3. The neutral shall evaluate the dispute based on the information submitted by the parties[, and having regard to the terms of the agreement,] and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be recorded on the ODR platform.

"4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.

"4 bis. The requirement in paragraph 3 for:

(a) The award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) The award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.

"5. The award shall state brief grounds upon which it is based.

"6. The award shall be rendered promptly, preferably within ten calendar days [from a specified point in proceedings].

"6. bis. 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.

"7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.

"8. In all cases, the neutral shall decide [ex aequo et bono], in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction]."

Remarks

31. Relevant commentary in relation article 7 (formerly article 9) as set out in paragraph 30 above can be found in document A/CN.9/WG.III/WP.123, paragraphs 53-56; and A/CN.9/WG.III/WP.119/Add.1, paragraphs 55-70.

32. In relation to paragraph (3), the phrase "and having regard to the terms of the agreement" has been inserted in square brackets for the consideration of the Working Group, to reflect the inclusion of similar language in article 7(3) of Track II proceedings.

33. **[Draft article 7 (bis) Correction of award**

"Within [five (5)] calendar days [after the receipt of the award], a party, with notice to the other party, may request the neutral 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 neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefor] within [two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of the award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.]]"

Remarks

34. Relevant commentary in relation to article 7 (bis) (formerly article 9 (bis)) can be found in document A/CN.9/WG.III/WP.119/Add.1, paragraph 72. The Working Group may wish to consider replacing the language "after the receipt of the award" with the phrase "after the award is communicated to the parties", in order to better reflect the language in article 7(3). The Working Group may also wish further to consider linking this language to the provisions on receipt and deemed receipt in article 3.

35. [**Draft article 7 (ter) Internal review mechanism**

"1. Either party may request annulment of the award within ten (10) calendar days of the communication of the award, by application to the ODR administrator, on the grounds that (a) the place of arbitration unfairly prejudiced that party; or (b) there has been a serious departure from a fundamental rule of procedure prejudicing that party's right to due process.

"2. The ODR administrator shall appoint a neutral unaffiliated with the ODR proceedings the subject of the request to assess the request within five (5) calendar days. Once the neutral is appointed, the ODR administrator shall notify the parties of such appointment.

"3. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral appointed in accordance with article 6."]

Remarks

36. Article 7 (ter) (formerly article 9 (ter)) was included by the Secretariat for the consideration of the Working Group at its twenty-seventh session (A/CN.9/WG.III/WP.119/Add.1, para. 73), to provide a proposed draft for a second-tier procedural review mechanism should the Working Group consider such a mechanism desirable in Track I proceedings. Recourse by parties to an award would otherwise lie in a claim for setting aside under national law.

37. The phrase "from the list of qualified neutrals maintained by the ODR provider or belonging to other arbitral institutions" to describe from where the ODR administrator might select a neutral has been deleted from paragraph (2), following the deletion of the principle of a "list of neutrals" in article 9 (appointment of a neutral).

38. Article 7 (ter) has not yet been considered by the Working Group. Relevant commentary can be found in document A/CN.9/WG.III/WP.119/Add.1, paragraphs 74-76.

6. Settlement

39. **Draft article 8 (Settlement)**

"*If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.*"

Remarks

40. A provision on settlement has been relocated from article 5 on negotiation to a separate article 8, to reflect the principle, also contained in Track II proceedings, that settlement can take place at any time during proceedings. Relevant commentary can be found in documents A/CN.9/WG.III/WP.130, paragraph 74; A/CN.9/WG.III/WP.127, paragraphs 89-91; A/CN.9/WG.III/WP.123, paragraphs 33-34; A/CN.9/WG.III/WP.119/Add.1, paragraphs 11-13.

7. Neutral

41. **Draft article 9 (Appointment of neutral)**

"*1. The ODR administrator shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR administrator shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.*

"2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules.

"3. The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the ODR administrator. The ODR administrator shall promptly communicate such information to the parties.

Objections to the appointment of a neutral

"4. Either party may object to the neutral's appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

"5. Where a party objects to the appointment of a neutral under paragraph 4(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR administrator will be final, subject to paragraph 4(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph 4(ii).

"6. Where a party objects to the appointment of a neutral under subparagraph 4(ii) above, the ODR administrator shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

["7. In the event both parties object to the appointment of a neutral under paragraph 4(i) or 4(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator, notwithstanding the number of challenges that has been made by either party.]

Objections to provision of information

"8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR administrator to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR administrator shall convey the full set of existing information on the ODR platform to the neutral.

Number of neutrals

"9. The number of neutrals shall be one."

Remarks

42. Article 9 (formerly article 6) has been modified to reflect the changes made in Track II proceedings, including a new paragraph (7), inserted in square brackets for the consideration of the Working Group. Relevant commentary can be found in documents A/CN.9/WG.III/WP.130/Add.1, paragraphs 2-3; A/CN.9/WG.III/WP.127/Add.1, paragraphs 2-7; and A/CN.9/WG.III/WP.123, paragraphs 36-42.

43. **Draft article 10 (Resignation or replacement of neutral)**

"If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR administrator shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions."

Remarks

44. Article 10 (formerly article 6 (bis)) remains unchanged from the last consideration by the Working Group of the text of Track I. Relevant commentary can be found in document A/CN.9/WG.III/WP.123, paragraph 44. See also document A/CN.9/WG.III/WP.130/Add.1, paragraph 5.

45. **Draft article 11 (Power of the neutral)**

"*1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*

"1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.

"2. Subject to any objections under article 9, paragraph 8, the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings[, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.]

"3. At any time during the proceedings the neutral may [require] [request] or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.

"4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.

"5. The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules."

Remarks

46. Various modifications have been made to the text of article 11 (formerly article 7) pursuant to discussions in relation to Track II proceedings. A competence-competence provision (paragraph (4)), deleted in relation to Track II proceedings, has been retained in relation to Track I, as has square bracketed language in paragraph (2).

47. It is suggested that, in accordance with changes made in relation to Track II proceedings, the square bracketed text in paragraph (2) be deleted.

48. Relevant commentary can be found in documents A/CN.9/WG.III/WP.123, paragraphs 46-48; A/CN.9/WG.III/WP.127/Add.1, paragraphs 10-14; and A/CN.9/WG.III/WP.130/Add.1, paragraphs 7-8.

8. General provisions

49. [**Draft article 12 — Deadlines**

"*The ODR administrator, or, if relevant, the neutral, shall notify parties of all relevant deadlines during the course of proceedings.*"]

Remarks

50. At its twenty-ninth session, the Working Group requested the Secretariat to insert a general provision in the Rules to reflect that the neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings; relevant commentary can be found in document A/CN.9/WG.III/WP.130/Add.1, paragraph 10.

51. **Draft article 13 (Dispute resolution clause)**

"*The ODR platform and ODR administrator shall be specified in the dispute resolution clause.*"

Remarks

52. Article 13 (formerly article 11) has been amended to reflect the indication of the Working Group that, at least in Track II proceedings, both the ODR platform and ODR administrator ought to be included in the dispute resolution clause. Relevant commentary can be found in document A/CN.9/WG.III/WP.130/Add.1, paragraphs 11-14; see also document A/CN.9/WG.III/WP.130, para. 15).

53. **Draft article 14 (Place of proceedings)**

"[*The ODR administrator shall select the place of proceedings, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules.*]"

Remarks

54. Article 14 (formerly article 10) has been relocated from the subheading "Arbitration" to "General Provisions". Article 14 has not yet been considered by the Working Group. Relevant commentary can be found in document A/CN.9/WG.III/WP.119/Add.1, paragraphs 78-80.

55. **Draft article 15 (Language of proceedings)**

"*The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)] [the offer for ODR proceedings accepted by the buyer]. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select.*"

Remarks

56. Article 15 (formerly article 12) has been amended to reflect the decision of the Working Group at its twenty-ninth session to streamline the provision in the Rules addressing language of proceedings. Relevant commentary can be found in document A/CN.9/WG.III/WP.130/Add.1, paragraph 16. The language provision most recently considered by the Working Group in relation to Track I proceedings can be found in document A/CN.9/WG.III/WP.119/Add.1, paragraphs 84-90. It is however suggested that the language agreed by the Working Group in relation to article 15 and set out in paragraph 55 above is equally relevant to Track I proceedings and should be retained.

57. The phrase "the offer for ODR proceedings" is not a defined term, and introduces a lack of clarity and an increased complexity in the draft, raising questions such as when an offer for proceedings has been made, and when acceptance has been proffered. Moreover, the term "buyer" has not been used in the Rules and lacks consistency with other provisions. The Working Group may consequently wish to consider alternative language, such as: "The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)] …", inserted in square brackets as an alternative (see A/CN.9/WG.III/WP.130/Add.1, para. 16).

58. **Draft article 16 (Representation)**

"*A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR administrator.*"

Remarks

59. Article 16 (formerly article 13) remains largely unchanged from the most recent consideration by the Working Group of the text of Track I proceedings. Relevant commentary in relation to article 16 as set out in paragraph 58 above can be found in document A/CN.9/WG.III/WP.130/Add.1, paragraph 18.

60. **Draft article 17 (Exclusion of liability)**

"[*Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR administrator and neutral based on any act or omission in connection with the ODR proceedings under the Rules.*]"

Remarks

61. At its twenty-ninth session, the Working Group decided to delete the provision on exclusion of liability in Track II proceedings (A/CN.9/801, paragraphs 159-160; and A/CN.9/WG.III/WP.130, para. 8). The Working Group may wish to consider deleting this provision in relation to Track I proceedings as well.

62. **Draft article 18 (Costs)**

"*The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.*"

63. In its consideration of the text of Track II proceedings, the Working Group agreed to use the word "decision" rather than "award" in the provision on costs: A/CN.9/801, paragraphs 161-163. The Working Group has not yet considered article 18 (formerly article 15) in relation to Track I proceedings.

64. [**Draft article 17 (Fees of ODR proceedings)**

"*The fees of ODR proceedings shall be reasonable in amount, and made available to the parties in advance of proceedings.*"]

Remarks

65. At its twenty-ninth session, the Working Group agreed that the Rules could address in a new provision the need for fees levied by ODR administrators or platforms to be reasonable (A/CN.9/801, para. 164). The Working Group may wish to consider including the same provision in Track I proceedings. Relevant commentary can be found in document A/CN./WG.III/WP.130/Add.1, paragraphs 22-23.

66. [**Annex X**

[*List of jurisdictions which would opt in to inclusion in such an Annex*]]

Remarks

67. Relevant commentary in relation to the proposed Annex, which is unique to Track I proceedings, can be found in document A/CN./WG.III/WP.123, paragraphs 17 and 66-67.

D. Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session (New York, 9-13 February 2015)

(A/CN.9/833)

[Original: English]

Contents

I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.[1] The Commission decided inter alia at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.[3] It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.
[2] Ibid., para. 218.
[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.[4] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5]

4. At its forty-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. The most recent compilation of historical references regarding the work of the Working Group can be found in document A/CN.9/WG.III/WP.132, paragraphs 5-14.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirty-first session in New York, from 9 to 13 February 2015. The session was attended by representatives of the following States members of the Working Group: Armenia, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Ecuador, France, Germany, Greece, Honduras, Hungary, India, Israel, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Czech Republic, Egypt, Libya and Netherlands.

8. The session was also attended by observers from the following non-Member States and entities: the Holy See.

9. The session was also attended by observers from the European Union (EU).

10. The session was also attended by observers from the following organizations of the United Nations System: World Intellectual Property Organization (WIPO).

11. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Association of the Bar of the City of New York (ABCNY), Center for International Legal Education (Cile), Centre de Recherche en Droit Public (CRDP), Chartered Institute of Arbitrators (CIARB), G.C.C. Commercial Arbitration Centre (GCCAC), Institute of Commercial Law (ICL), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), Internet Bar Organization (IBO), National Center for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Queen Mary University of London, Centre for Commercial Law Studies.

12. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah-Teck CHAN (Singapore)

Rapporteur: Mr. Pradip CHAUDHARY (India)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.132);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.133);

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[4] Ibid.
[5] Ibid.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I) (A/CN.9/WG.III/WP.133/Add.1);

(d) A note by the Secretariat on the proposal by the Governments of Colombia and the United States of America (A/CN.9/WG.III/WP.134).

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 online dispute resolution for cross-border electronic transactions: draft procedural rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

15. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.133 and its addendum; A/CN.9/WG.III/WP.134). The Working Group took into account proposals made at the session. The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

16. The Working Group continued its strenuous efforts to achieve consensus on the text of the draft Rules, on the basis of various proposals made during the session (see paras. 73 to 100 and 142 to 149). As no consensus was reached, it was said that the Commission should terminate the mandate of the Working Group. It was added that this would be in accordance with the Commission's view that UNCITRAL's scarce resources should be deployed in undertaking legislative development on those topics on which it was likely that consensus could be achieved. Other delegations expressed the view that the Working Group should continue with its efforts to find a consensus on the third proposal. It was noted by these delegations that there were new elements for a consensus that had been identified and that could form the basis of a positive outcome for the Working Group (see, further, paragraphs 156-159 of this Report).

17. The Working Group was also invited to engage in informal consultations before the Commission session in 2015, with a view to enhancing constructive discussion at that session (see, further, paragraph 164 of this Report).

IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

18. It was recalled that the Commission had previously expressed concerns about the length of time that some Working Groups had taken to finalize their texts. In this regard, the Working Group recognized the need for progress at this session to resolve critical issues that would enable a set of ODR rules acceptable to all.

19. The attention of the Working Group was drawn to paragraph 94 of the Report of its thirtieth session (A/CN.9/827), in which it was stated that the Working Group would continue its deliberations on the basis of the third proposal as set out in A/CN.9/WG.III/WP.133. It was agreed that this proposal would be the first item for the Working Group to consider, while referring to the other proposals reflected in A/CN.9/WG.III/WP.133 as necessary, and that this item would be followed by the question of private enforcement mechanisms.

20. In this context, it was noted that two States had submitted a proposal on the question of charge-backs for this session (see para. 95 of A/CN.9/827, and A/CN.9/WG.III/WP.134), and the Working Group heard a brief exchange of views on the topic.

21. Examples of private enforcement mechanisms, it was said, already existed in practice. However, it was observed, such mechanisms were in essence discretionary (revocation of a trust mark might not be undertaken following a single claim against a seller, for example) and were based on contractual mechanisms between the parties (and so would bind only those parties).

22. In this regard, reference was made to the proposal set out in A/CN.9/WG.III/WP.134 which, it was noted, proposed a model law on charge-backs, and so could provide an element of automatic or self-executing outcome. It was also noted that such a determination could be enforced in accordance with the provisions of relevant national law (of which examples existed, as referred to in A/CN.9/WG.III/WP.134). The Working Group agreed to defer further consideration of this item.

The third proposal as set out in A/CN.9/WG.III/WP.133

23. It was recalled that the third proposal provided for a three stage process — negotiation; negotiated settlement facilitated by a neutral; and a final determination, the procedure for which was to be settled on the basis of options provided by the neutral.

24. It was noted that there were three main issues upon which further clarity in the third proposal was needed, as follows:

(a) In the event that the parties were unable to agree on the procedure for the final determination, what the default procedure would be;

(b) What the outcome would be in the event that the parties chose a non-binding recommendation as the final determination;

(c) Whether the process should end in an outcome that was final and binding (and so precluded access to the courts — res judicata).

25. It was emphasized that the term “recommendation” used in this context did not imply a mere suggestion, but one that would or could be implemented by a private enforcement mechanism, such as a charge-back or a trust mark (for a description of these mechanisms, see A/CN.9/WG.III/WP.124). It was suggested that the term “recommendation” might be revisited in due course, so as to reflect more closely the nature of this final determination.

26. The Working Group agreed to devote no more than three days of the current session to its consideration of the third proposal, before turning to the question of private enforcement mechanisms.

27. The proponents of the third proposal stated that revisions to the iteration set out in A/CN.9/WG.III/WP.133 would be submitted to the Working Group later in the session. The proponents confirmed that the main elements of the existing draft would remain, with some amendments and additions (such as referring to a “facilitated mediation” stage), most of which were based on A/CN.9/WG.III/WP.133 and some others on provisions in earlier Working Papers.

28. As regards question (a) in paragraph 24 above, it was noted that the first two options available for the neutral to propose for the final procedure, set out in paragraph 22 of A/CN.9/WG.III/WP.133, would be retained. That is, the final procedure could be non-binding recommendation or arbitration, but there would be no further option that the neutral could recommend (contrary to the existing draft). It was also confirmed that the proposal envisaged that the default procedure would be a non-binding recommendation. Support was expressed for this approach, recalling that it would also envisage an implementation mechanism as permitted in the jurisdiction concerned.

29. It was stated that there existed many variations of private enforcement mechanisms in practice — an example was given of implementation through consumer associations, though enforcement through judicial procedures would not be envisaged under the proposal. It was noted that only the buyer (and not the seller) could take advantage of a private enforcement mechanism, and it was queried whether such a mechanism could be enforced across borders.

30. It was also queried whether a system with non-binding recommendation as the default procedure was more closely aligned with a B2C than a B2B procedure, and so was in fact intended to address only B2C transactions. It was confirmed that the proposal was not limited to B2C disputes (though it was added that B2B parties could in any event opt in to B2C procedures). It was recalled that both B2B and B2C low-value transactions were included in the mandate of the Working Group. A further alternative could be that the purchaser's choice would determine the final procedure.

31. Other views expressed were that the default mechanism should be for a binding arbitration for both B2B and B2C transactions, to allow for the recognition of binding pre-dispute agreements to arbitrate. Some delegations, in the alternative, suggested that B2B and B2C transactions might be treated differently in this regard. A one-size-fits all solution for both B2B and B2C, it was added, was undesirable. Accordingly, arbitration-based rules could be applied to B2B transactions and recommendation-based rules could be applied to B2C transactions.

32. In addition, it was suggested that whether the proposal would apply to B2C transactions only should be agreed before discussing in detail the final determination procedure.

33. The feasibility of seeking to distinguish between B2B and B2C transactions was considered. Some delegations considered that it would be difficult to do so, especially in the cross-border context, and controversies that had arisen in one jurisdiction in seeking to distinguish between the two types in practice were shared. It was added that seeking to classify transactions would impose additional procedural costs, and might lead to rules that were difficult to implement and to enforce, and that would consequently not prove effective.

34. The Working Group agreed to revisit this issue at a later stage, at which stage it would also consider whether the terms "low-value" and "consumers" needed to be defined.

B. Draft procedural rules

1. Arbitration

Draft article 7, Arbitration (para. 21, A/CN.9/WG.III/WP.133)

35. The following revisions to draft article 7 of the iteration of the third proposal in A/CN.9/WG.III/WP.133 were proposed.

36. Regarding paragraph 1, it was noted that the Rules contemplated that a neutral previously acting as mediator should continue as neutral in the arbitration stage, and that this final stage of the procedure should be based on the documents previously submitted. It was suggested that the parties should be able to challenge this continuity under the rules, for example through an ability to register any objection by a given deadline. It was recalled that the Working Group had previously considered this issue (see for example A/CN.9/721, paras. 66-67), and had agreed to include in the ODR system safeguards to address the difficulties that the dual role would raise, notably as regards the independence and impartiality of the neutral.

37. In considering this suggestion, it was underscored that the objective was to ensure that any arbitral award would be capable of being enforced through the judicial process, which itself required compliance with due process requirements, including that the parties select the neutral and that the neutral be independent. It was emphasized that these due process requirements arose irrespective of the value of the claim, and that an individual party should not bear the costs of enforcing those rights.

Furthermore, the ability to pass these costs on to a party, it was said, might encourage the ODR administrator to design systems that would not keep costs to an appropriate level for all concerned.

38. A second motivation for the suggestion, it was explained, was that the parties might not wish that all communications exchanged with the mediator be taken into consideration in a subsequent arbitration, and would wish to keep control of the documents upon which the neutral would base its decision. On the other hand, the view was expressed that in the typical online transaction, the documentation that a purchaser might not wish to disclose would be negligible.

39. While the suggestion received support, other delegations noted that the Rules were designed for the resolution of low-value claims, and not retaining the neutral and the documents previously submitted might add time and cost to the process. In this regard, it was stated that many arbitral systems around the world retained the neutral throughout equivalent procedures, and that the question of costs and who would bear them were significant. Indeed, it was noted, the cost of a second review of the documents might mean that procedural cost exceeded the amount of the (low-value) claim itself. On the other hand, it was noted that some existing ODR platforms provided a free-of-charge system.

40. Other views were that a neutral previously acting as mediator should in principle not continue as an arbitrator, and any agreement to the continuation of the neutral as an arbitrator should be on the basis of explicit and informed consent, and not through implicit approval. It was suggested that the fact of adopting the Rules at the time of the transaction could constitute explicit approval to the continuation of the neutral as arbitrator and also would constitute an agreement that the documents submitted during earlier stages be used as a basis for the arbitration.

41. In the context of low-value online transactions, it was said that purchasers would generally not read the terms of the dispute resolution clauses at the time of the transaction, and that low-value purchasers would in practice not be able to challenge or change the terms of the transaction and dispute resolution mechanism. In this regard, the terms of article 1, paragraph 1, of the draft Rules were recalled, which provided that the selection of the Rules was undertaken separately from the transaction itself. Once a dispute had arisen, however, the purchaser would be more inclined to review the provisions of the Rules including on the continued appointment of the neutral and on disclosure of documents. In addition, it was highlighted that the issue would arise only in the type of transaction where the parties would agree to arbitration (whether the transaction concerned might be B2B or B2C).

42. It was also noted that the qualification requirements at the national level might preclude the continuation of a neutral as an arbitrator, and that the Working Group had previously agreed to address the issue of qualifications in guidance to support the Rules. One option would be for that guidance to advise that any neutral appointed for facilitated settlement should be qualified to act as an arbitrator. However, the Working Group was urged not to impose requirements that would inevitably place disproportionate costs on the system overall. Since only a small proportion of cases proceeded to an arbitration stage, requiring all mediators to be qualified arbitrators might indeed impose excessive levels of cost. It was also recalled, in this regard, that the ODR administrator's pricing mechanism would take the varying nature of claims into account.

43. After discussion, the Working Group agreed that the suggestion as formulated in paragraph 36 here above should be included in the next iteration of the Rules.

44. The Working Group then considered the consequences of any such objection raised. It was agreed that those consequences were in part addressed in article 9, but would need to be supplemented. Paragraph 5 of draft article 9 required the appointment of a new neutral, and paragraph 8 contemplated objections to the provision of information without addressing the consequences of such objections being filed. It was agreed that the ODR administrator would assess any objections filed. It was suggested, therefore that paragraph 8 should be supplemented to provide

appropriate guidance to the ODR administrator for this purpose, to the effect that certain minimum documents must be provided to the neutral, to include the notice, response and any counterclaim, and the final submissions in the arbitration. In addition, the guidance would note that certain documents — such as those pertaining to negotiations and communications exchanged in the facilitated settlement stage could be excluded.

45. In response to a query about how costs of the system would impact the design of the mechanism, it was confirmed that fees would not be addressed in the Rules, as they would be a matter for the ODR administrator when setting its prices. It was also recalled that the Working Group had previously determined that the Rules would not allow for an award of costs (draft article 18).

46. As regards paragraph 3, it was suggested that the phrase in square brackets "and having regard to the terms of the agreement" should be replaced with the substance of paragraph 8, i.e. "in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances". In consequence, paragraph 8 would be deleted. In support of the suggestion to delete the phrases in square brackets in paragraph 8, it was stated that the phrase "*ex aequo et bono*" was vague, and "any usage of trade applicable to the transaction" would be unlikely to be relevant in the context of low-value claims.

47. Another view was that the references to "*ex aequo et bono*" and "any usage of trade applicable to the transaction" should be retained, notably in the context of parties without equal bargaining power, so that the overall outcome should be fair as between the parties. In addition, while it was acknowledged that it would be rare that this clause would be invoked in small consumer claims; the flexibility to avoid in-depth interpretations of contractual provisions might be required. It was further suggested that the scope of the issues at stake — generally confined to non-delivery or non-conformity of delivered goods — was such that the scope for ambiguity was limited.

48. A further suggestion was that the term "*ex aequo et bono*" should be expressed in the vernacular, referring to principles of fairness, justice and reasonableness and indicating the nature of the flexibility being conferred to those unfamiliar with the Latin phrase.

49. In this regard, it was agreed that the arbitrator should apply the terms of the contract in the context of the facts and circumstances of the case, and basic principles of fairness and justice or reasonableness. These would include factors such as trade usage. The Secretariat was accordingly requested to provide appropriate language to reflect this approach for the next iteration of the Rules.

50. As regards paragraph 6, it was noted that the goal was to ensure efficiency in the process. Expressing a certain deadline for the award to be rendered, such as 10 days from the deadline for final submissions or from the closing of the hearing, was recommended.

51. In this regard, it was clarified that the reference to "final submissions" was to the "final communications" referred to in draft article 7, paragraph 1, and so the time period would start when the final communications were filed. It was also agreed that the word "preferably" would be deleted from draft article 7, paragraph 6. The Secretariat was accordingly requested to reflect this clarification in the next iteration of the Rules.

52. It was noted that the different language versions of the text should take account of the use of technical terms in different national systems.

53. A query was raised regarding a settlement under the Rules: could the settlement agreement be recorded as an arbitral award capable of enforcement through normal mechanisms? The experience of one system, in which the parties could request a neutral that a settlement agreement be so recorded, was shared. It was noted that recourse to Court enforcement would be unlikely in the context of low-value claims.

54. It was suggested that settlements at all stages in the ODR system could be registered in this way, so as to prevent sham arbitration proceedings being launched merely to seek a consent award. It was emphasized that both parties would also need to agree to such a step.

55. Another view was that this approach could be the outcome only in an arbitration process. In this regard, reference was made to views expressed in an earlier session of the Working Group to similar effect.[8] Settlements from these types of resolution, it was said, might not be capable of enforcement under the New York Convention in any event.

56. After discussion, it was agreed that the parties could request the neutral to register their settlement as an arbitration award, in order to facilitate enforcement only where the settlement was reached in arbitration proceedings. It was agreed that explanation and guidance reflecting the Working Group's conclusions that a settlement outside arbitration proceedings could not be so registered could be formulated at a later time. Such commentary, it was said, could also include references to private enforcement mechanisms.

Draft article 7 bis, Correction of award (para. 23, A/CN.9/WG.III/WP.133)

57. In response to a query on the short deadlines in this paragraph, it was recalled that all time limits would be considered at the end of the review of the Rules, with a view to ensuring that the entire process was short in the context of low-value claims. It was confirmed that calendar days were generally envisaged under the Rules, rather than working days.

58. It was queried whether the timelines provided for in paragraph 7 bis might raise some confusion on the part of the parties as to how to implement the award "without delay" as required in paragraph 7. It was agreed to revert to this question at a future time.

Draft article 7 ter, Internal review mechanism (para. 24, A/CN.9/WG.III/WP.133)

59. It was recalled that this provision had been introduced to allow the issues set out in the draft article to be addressed, noting that there was no appeals mechanism under the Rules. In response to a suggestion that use of the internal review mechanism should not be required before recourse to the Courts or other forum such as ICSID, it was clarified that the Working Group had previously agreed not to refer to national Courts and systems in the Rules themselves.

60. It was commented that this provision differed from existing arbitral practice that permitted arbitral awards to be set aside on a broader range of grounds through Court procedures, including under the UNCITRAL arbitration texts, and raised many practical issues. It was suggested that adequate protection of the parties would be ensured through those existing mechanisms, and accordingly that article 7 ter should be deleted. In addition, it was suggested that the procedure would serve only to delay the overall procedure, and would not be appropriate in the context of low-value claims. In response, it was suggested that the simple mechanism envisaged in article 7 ter was an innovation designed for the low-value claims environment.

61. The Working Group agreed to delete draft article 7 ter.

2. Neutral

Draft Article 9, Appointment of neutral (para. 26, A/CN.9/WG.III/WP.133)

62. It was proposed that the ODR administrator should not appoint the neutral (but should have a list of neutrals to give to the parties so that they make their choice). It was recalled that this question had been considered previously and the current iteration reflected earlier deliberations in the Working Group. Safeguards were

[8] Ref. para. 53. Report A/CN.9/769 (27th session report).

provided in paragraphs 3-7 of article 9, it was noted, which gave the parties a say in the appointment and reflected fairness in the process. Consequently, there was no support for the proposal.

63. It was recalled that the aim of the ability to challenge under paragraph 4(i) was to ensure simplicity and speed in the process, without triggering a review; nonetheless, it was suggested that paragraph 4(i) be deleted. It was also queried whether, at the arbitration stage, the parties can then raise objections to a neutral previously appointed. In this regard, it was noted that the provisions did not distinguish between the stages of the procedure. Accordingly, it was suggested that a reference to the third possibility to object be added in article 9, paragraph 4, so as to reflect the concerns expressed regarding article 7(1) (that is, when a neutral continues as an arbitrator). The drafting of such a provision was left to the Secretariat, including the procedure for appointment by the ODR administrator in such a situation.

64. It was proposed that wording be added to article 7(1) allowing a party to object to the fact of the neutral in the facilitated settlement stage continuing to be the neutral in the arbitration stage. It was suggested that such a challenge could be added to article 9(4) as a further ground of objection regarding neutrals, with an accompanying reference thereto in article 7(1). The Secretariat was asked to provide the necessary wording changes in the next iteration of the Rules. It was also recalled that an objection could be raised at any stage in the procedure.

65. It was proposed that the provisions under sub-item (i) in paragraph 4 of draft article 9 should be deleted, for two main reasons: in B2C transactions it might favour any merchant that knew the neutrals and in an online environment it could be considered superfluous. An alternative suggestion was that specific grounds for objecting to the appointment of neutral should be required. A further view was that the provisions should be retained, because of their interaction with draft article 9.

66. It was noted that the objectives of the possibility of peremptory challenge under sub-item (i) of paragraph 4 were to avoid lengthy discussion on the appointment and to ensure a swift resolution of any objection made. The Working Group agreed to leave the provision unchanged, again subject to possible further revision at a later time.

67. As regards paragraph 7, it was agreed that the text should be retained, and that the square brackets surrounding the text should be deleted.

68. As regards paragraph 8, it was observed that there were two points during the ODR procedure at which the procedure shifted from one stage to another, but only one shift was addressed in the paragraph as currently drafted (that from negotiations to facilitated settlement). It was suggested that the scope of this paragraph should be expanded to address in addition any shift from facilitated settlement to a final determination. It was added that the paragraph should not imply that the ODR administrator should decide what information is to be provided to the neutral, as this was a matter for either party to decide as regards its own information, and the text should be modified accordingly. The Secretariat was requested to incorporate guidance in these terms in the next iteration of the Rules.

C. Proposal by the Governments of Colombia and the United States of America

69. The Working Group heard a summary of the proposal from the Governments of Colombia and the United States of America, drawing on document A/CN.9/WG.III/WP.134 as regards the proposal itself, and its Annex as regards the existing system in Colombia.

Presentation by the Federal Trade Commission (FTC) to the Working Group on practical experience in operating a chargeback mechanism in the United States

70. Introducing the mechanism, it was said that it was simple, flexible, transparent, free-of-charge for the consumer and user-friendly. The mechanism was described as follows:

(a) An increase in the use of online transactions had followed the introduction of the charge-back mechanism in the United States, accredited to the increased trust that the system afforded. Greater access to SMEs as merchants through their increased visibility in the online marketplace was possible. Other benefits included enhanced standards of customer care for reputational reasons, and that possible instances of fraud or other illicit business practice might be apparent where significant numbers of charge-backs applied to individual merchants;

(b) As regards the process, a consumer would advise of a complaint, which the payment platform would investigate during a period of time specified in the law. During the investigation, the debt would be suspended, and upon determination, either the charge would be reversed (through an automatic mechanism), or the charge-back would be denied (and at that point, the payment would become due). In the latter case, reasons for the denial must be given to the consumer;

(c) The mechanism in the United States covered credit and debit card payments, but could be extended to any virtual payment. It was emphasized that in the United States, all payment providers (a term that was intended to encompass all payment platforms) were obliged to provide the charge-back mechanism, including those operated by third parties;

(d) The OECD had reported that a charge-back mechanism was effective in allowing the liabilities between the parties to be resolved, whether domestic or international. However, each jurisdiction would need to adapt the mechanism to local circumstances. Local law would set out when payments would be deemed to be unauthorized (e.g. non-conformity or non-receipt of goods) or when payment might otherwise be reversed (e.g. where fraud was discovered).

71. In a question-and-answer session:

(a) It was confirmed that the mechanism applied only to consumer purchasers and not to business purchasers, was limited to the value of the goods at issue, and did not address compensation for other harms (e.g. product liability). It was added that a charge-back system would not replace other remedies, including class actions, but that there should be no permissible double recovery through separate action if a payment were reversed; and

(b) Regarding whether a law was needed to enable a charge-back mechanism, in the light of existing international systems operating without legal regulation, it was suggested, in response, that the principal purpose of a law would be to provide minimum guarantees for consumer protection, such as a statutory burden to investigate on the payment provider. It was suggested that the investigatory function of the payment platform could be adapted to the context of the ODR Rules that covered merchant, purchaser and ODR administrator. The Working Group agreed to consider this issue later in the session.

D. Proposal from China

72. The Working Group heard a presentation of a further iteration of the third proposal for the Rules from the delegation of China.

Proposal by China for Draft Procedural Rules based on A/CN.9/WG.III/WP.133

"Draft preamble

73. "*~~[1. The UNCITRAL online dispute resolution rules (the "Rules") are intended for use in the context of disputes arising out of cross border, low value transactions conducted by means of electronic communication.]~~*

["***~~2.~~1.*** *The Rules are designed to provide ~~an easy, fast, cost effective~~* ***convenient and efficient*** *procedures for dispute resolution in low-value, high-volume electronic commerce transactions.*]

["***~~3.~~2.*** *The Rules are designed to create a safe, predictable legal environment for transactions, to ensure traders' confidence in the online market.*]

["***~~4.~~3.*** *The Rules are designed to be able to facilitate micro, small and medium-sized enterprises' access to international markets through electronic commerce and mobile electronic commerce.*]

["***~~5.~~4.*** *The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix:*]

[*(a) Guidelines and minimum requirements for online dispute resolution platforms/administrators;*]

[*(b) Guidelines and minimum requirements for neutrals;*]

[*(c) Substantive legal principles for resolving disputes;*]

[*(d) Cross-border enforcement mechanism;*]

[…]."

Draft procedural rules

1. Introductory rules

74. **Draft article 1 (Scope of application)**

"*1(a). The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.*

"*1(b). Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be exclusively resolved through ODR proceedings under these Rules (the 'dispute resolution clause').*

"*2. These Rules shall only apply to claims:*

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the sales or service contract referred to in paragraph 1 (a); or

(b) That full payment was not received for goods or services provided.

["*3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail.*"]

75. **Draft article 2 (Definitions)**

" […]"

"*6. 'Neutral' means an individual* ***or institution*** *that assists the parties in settling or resolving the dispute.*

"[…]"

76. **Draft article 3 (Communications)**

"[…]"

2. Commencement

77. **Draft article 4A (Notice)**

"*1. The claimant shall communicate to the ODR administrator a notice in accordance with* ***article 4A,*** *paragraph 4,* ***when disputes arise****.* ~~*[The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.]*~~

"*2. The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.*

"*3. ODR proceedings shall be deemed to commence when, following communication* ***from the claimant*** *to the ODR administrator of the notice pursuant to* ***article 4A, paragraph 1****, the ODR administrator notifies the parties of the availability of the notice at the ODR platform.*

"*4. The notice shall include:*

"*(a) The name and [designated] electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;*

"*(b) The name and [designated] electronic address of the respondent and of the respondent's representative (if any) known to the claimant*;

"*(c) The grounds on which the claim is made* ***including all documents and other evidence relied upon by the claimant, or contain references to them****;*

"*(d) Any solutions proposed to resolve the dispute*;

[*"(e) A statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;*]

[*"(f) The location of the claimant;*]

"*(g) The claimant's preferred language of proceedings*;

"*(h) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.*

[*"5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim, and also information in relation to the pursuit of other legal remedies.*"]

78. **Draft article 4B (Response)**

"[…]"

79. [**Draft article 4C (Counterclaim)**

"[…]"

3. Negotiation

80. **Draft article 5 (Negotiation)**

Commencement of the negotiation stage

"*1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR administrator, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or*

after the expiration of the response period set out in article 4C, paragraph 2, whichever is earlier.

"*2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform*.

Commencement of the facilitated settlement stage

"~~*3. If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence*~~

"~~*4.*~~***3.*** *If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence*.

Extension of time

"~~*5.*~~***4.*** *The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days.*"

4. Facilitated settlement

81. **Draft article 6 (Facilitated settlement)**

"*1.* ***If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or either party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence****.*

"~~*1.*~~***2.*** *Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)]*.

"~~*2.*~~***3.*** *Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement*.

"~~*3.*~~***4.*** *If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) the ODR proceedings shall move to the final stage of proceedings pursuant to draft* ***Chapter 4*** *(Guidance of ODR Administrator).*"

82. **Draft article 6 bis**

"[…]"

5. Arbitration

83. **Draft article 7 (Arbitration)**

"*1.* ***The appointment of neutral responsible for the arbitration by ODR Administrator should conform to the laws of the place of ODR Administrator****.*

"*1* ***bis****. At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made.*

Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

"*2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require*.

"*3. The neutral shall evaluate the dispute based on the information submitted by the parties[, and having regard to the terms of the agreement,] and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be recorded on the ODR platform*.

"*4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.* ***The place of arbitration means registration place of ODR administrator***.

"*4 bis. The requirement in paragraph 4 for:*

(a) The award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) The award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.

"*5. The award shall state brief grounds upon which it is based*.

"*6. The award shall be rendered promptly, preferably within ten calendar days* ~~*[from a specified point in proceedings]*~~ ***from the date of both parties having received the notice of arbitration***.

"*6. bis. 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*.

"*7. The award shall be final and binding on the parties. The parties shall carry out the award without delay*.

"*8. In all cases, the neutral shall decide [*ex aequo et bono*], in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction]*."

84. [***Draft Guidance of ODR Administrator regarding article 7 (proposed as part of the third proposal, A/CN.9/827, para. 72)***]

"***1***. *If the Neutral has not succeeded in facilitating a settlement at the expiry of the facilitated settlement stage, the ODR administrator shall, on the basis of information submitted by the parties, present to the parties the following options, and ensure that they are aware of the legal consequences of the choice of each track:*

(1) Arbitration (as referred to in draft article 7 of Track I);

(2) The Neutral's recommendation (as referred to in Track II)."

"***2. If the parties notify the ODR Administrator within 5 calendar days from the expiry of facilitated settlement that they agree to settle the dispute through arbitration provided in paragraph 1 of this Article, the ODR Administrator shall appoint the neutral responsible for the arbitration and communicate the notice of arbitration to the parties within 5 calendar days after receiving the notices from the parties and from that date, the arbitration proceedings provided in Chapter 5 of these Rules shall commence.***

"***3. If the parties notify the ODR Administrator within 5 calendar days from the expiry of facilitated settlement that they agree to settle the dispute through***

the recommendation of neutral provided in paragraph 1 of this Article, the ODR Administrator shall appoint the neutral responsible for making the recommendation and communicate the notice of such appointment to the parties within 5 calendar days after receiving the notices from the parties and from that date, the recommendation proceedings provided in Chapter 6 of these Rules shall commence.

"***4. If the parties fail to notify the ODR Administrator within 5 calendar days from the expiry of facilitated settlement that they agree to settle the dispute through one of the two tracks provided in paragraph 1 of this Article, the ODR Administrator shall appoint the neutral responsible for the making the recommendation and communicate the notice of such appointment to the parties within 10 calendar days after the expiry of facilitated settlement, and from that date, the recommendation proceedings provided in Chapter 6 of these Rules shall commence.***"

85. [**Draft article 7 (bis) Correction of award**

"[…]"

86. [**Draft article 7 (ter) Internal review mechanism**

"[…]"

6. Settlement

87. **Draft article 8 (Settlement)**

"[…]"

7. Neutral

88. **Draft article 9 (Appointment of neutral)**

"[…]"

89. **Draft article 10 (Resignation or replacement of neutral)**

"[…]"

90. **Draft article 11 (Power of the neutral)**

"[…]"

8. General provisions

91. [**Draft article 12 — Deadlines**

"[…]"]

92. **Draft article 13 (Dispute resolution clause)**

"[…]"

93. **Draft article 14 (Place of proceedings)**

"[*The ODR administrator shall select the place of proceedings~~, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules.]~~* ***in consultation with parties***.]"

94. **Draft article 15 (Language of proceedings)**

"[…]"

95. **Draft article 16 (Representation)**

"[…]"

96. **Draft article 17 (Exclusion of liability)**

"[…]"

97. **Draft article 18 (Costs)**

"[…]"

98. [**Draft article 17 (Fees of ODR proceedings)**

"[…]"]

99. [**Annex X/list on designated website**

"[…]"]

100. The following addition was also proposed:

"**Draft article 7 bis, Recommendation by a neutral**

"1. The neutral shall, within fifteen (15) calendar days of the expiry of the facilitated settlement stage, evaluate the dispute based on the information submitted by the parties, and having regard to the terms of the agreement, shall make a recommendation in relation to the resolution of the dispute. The ODR administrator shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.

"2. The recommendation shall not be binding on the parties unless they otherwise agree."

101. The delegation of China confirmed that the first additional paragraph was based on document A/CN.9/WG.III/WP.130, paragraph 69, item 4.

102. It was noted that the Working Group had not yet come to consensus on the third proposal itself as reflected in A/CN.9/WG.III/WP.133, but had agreed at the end of the last session to continue its deliberations on the basis of that proposal. The Working Group accordingly agreed that earlier decisions during this session as regards the third proposal in A/CN.9/WG.III/WP.133 should be borne in mind, and that further deliberations on some elements of the third proposal set out in A/CN.9/WG.III/WP.133 might be needed.

103. The delegation explained certain of the proposed amendments as follows:

(a) The definition of the neutral should include reference to an institution, so as to reflect those national systems that permitted only institutional, rather than ad hoc arbitration. It was clarified that the term was intended to refer to professional arbitration institutes;

(b) Accordingly, the appointment of the neutral should conform to the laws of the place of the ODR administrator as proposed in new draft article 7, paragraph 1;

(c) The place of arbitration would be important in identifying the applicable law and so should be determined at the outset, and the selection of the location of the ODR administrator in amended draft article 7, paragraph 4, would reflect the default position in some existing arbitration systems;

(d) The new provisions in paragraphs 2-4 of the guidance to the ODR administrator regarding draft article 7 were without prejudice to the issue of whether the neutral previously appointed would continue as such at the final stage;

(e) That the proposed new draft article 14 would allow the parties' positions to be respected, and ensure independence and impartiality.

104. It was also suggested that draft article 1, paragraph 1, should be amended to narrow the scope of the rules so as to reflect the nature of the transactions intended to be covered by the Rules (and notably cross-border transactions). The Working Group agreed to defer the question to a later time.

105. It was noted that the proposal from the delegation of China suggested amendments to the third proposal as set out in A/CN.9/WG.III/WP.133. The Working Group was invited to comment on the proposal from the delegation of China. Comments on the preamble in that proposal were reserved until the end of this review.

A discussion of A/CN.9/WG.III/WP.133 itself, it was noted, would take place at a later date.

106. As regards draft article 2(6), the proposal to include the term "institution" as explained above did not gain support.

107. As regards draft article 4A, the Secretariat was requested to include the proposed additions to items (1) and (3) in the next iteration of the Rules.

108. As regards the provision proposed to be moved from item (1) to item (4), it was noted that the text was proposed to be amended as well as removed. The language in A/CN.9/WG.III/WP.133 ("[The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.]") was facilitative, but that the proposed addition to item (4) was mandatory. In support of the proposal, the importance of full filings was emphasized.

109. It was recalled that the Working Group had previously amended the mandatory provisions to make them facilitative, and had taken into account that the claimants might not be experienced in making such filings. For this reason, draft article 11(3) permitted the neutral to request additional material as needs arose. In the light of these matters, there was no support for these proposed amendments to items (1) and (4).

110. As regards the proposed removal of text from draft article 5 to draft article 6, it was explained that the revisions would better reflect the chronology of events in the proceedings. It was recalled that this provision (originally set out in A/CN.9/WG.III/WP.130) was a bridging provision between two stages of the Rules, and had therefore been included in draft article 5. The Secretariat was requested to place the provision in the most appropriate location in the next iteration of the Rules.

111. As regards the proposed new paragraph 1 in draft article 7, it was recalled that UNCITRAL had deliberated on this issue at many sessions of its Working Group. In support of the proposal, it was explained that under arbitration law in China only awards made by an arbitral institution and not those made by an individual were provided for, and that this proposed addition was also an application of the proposed change to the definition of the neutral referred to above. In addition, it was suggested, the proposals would ensure that the appropriate applicable law was used.

112. It was also noted that the proposal regarding draft article 7(1) related to the proposed revisions to draft articles 7(4) and 14. It was suggested that the provisions of draft article 14 in A/CN.9/WG.III/WP.133 should remain and the approach set out therein be applied throughout article 7. It was further observed that the proposed amendments to draft articles 7(4) and 14 appeared to contradict each other, and that there should be no difference between the place of arbitration and the place of the proceedings.

113. In addition, it was said that the parties would not be able to derogate from mandatory provisions of law applicable to the ODR process by agreement, including as regards a choice of law determination as might be contemplated in draft article 7. Further, it was noted that a provision relating to choice of law, as draft article 7(1) implicitly contemplated, was unnecessary and, as the Rules had been drafted for simplicity, would undermine the approach.

114. In the light of these matters, there was no support for the proposed additions to draft article 7 (1) and (4).

115. As regards the proposed amendment to draft article 7(6), it was observed that the proposed time frame was short, and appeared to contradict the provisions of draft article 7(1) bis, which itself allowed 10 days for the filing of final communications. It was also recalled that time periods would be considered at a later time (see, further, paragraph 57 above).

116. In response, it was observed that this iteration of the third proposal had built in a time period for issue of a notice of arbitration in the proposed guidance for the ODR administrator (see paragraph 84 (1), item (1) above). The need for a swift

determination for the appropriate operation of the websites concerned was emphasized.

117. A further view expressed was that the proposals appeared to separate the process into two distinct stages, contrary to the provisions of draft article 7(1) bis, which contemplated an automatic transition to the final determination procedure. It was also recalled that, earlier in the session, the Working Group had decided that (a) the provisions provide for a deadline to be expressed as a defined period after the final communications were filed and (b) the word "preferably" be deleted. The Working Group maintained its earlier decision.

118. As regards the proposed draft guidance of the ODR administrator in paragraph 84 above, it was observed that the proposal was intended to operate to provide a default option in favour of a non-binding recommendation under the Rules, unless a second decision to arbitrate at the final stage were made after the dispute had arisen (a "second click").

119. In addition, it was noted that the proposal provided that the ODR administrator would appoint a neutral to make a non-binding recommendation if the parties were unable to agree on the final determination procedure.

120. Earlier discussions in the session regarding whether the term "recommendation" should be retained were recalled. The Working Group was requested to consider possible alternative terms.

121. Interventions at earlier sessions of the Working Group to the effect that many States permitted binding pre-dispute agreements to arbitrate were also recalled, and that B2B transactions with pre-dispute binding agreements to arbitrate had been recognized for many decades. It was also suggested that in a number of jurisdictions, pre-dispute binding agreements to arbitrate for both B2B and B2C transactions must be recognized, as a requirement among other things of the New York Convention. In this regard, it was also recalled that the proponents of the third proposal had earlier confirmed to the Working Group that it was not intended to override mandatory provisions of applicable national law.

122. It was also queried whether the draft proposal was intended to apply to both B2B and B2C transactions, recalling in this regard that there was no national prohibition of binding pre-dispute agreements to arbitrate in the B2B context. In response, the proponents stated that the question should be settled by consensus of the Working Group. The proponents added that there would be concerns about how to create an effective mechanism to distinguish B2B and B2C transactions. Another view was that a definition of a consumer could be contemplated.

123. It was suggested that the scope of the draft Rules could be amended to exclude B2B cases in which there was a pre-dispute agreement to arbitrate. Thus, it was suggested, B2B cases without such prior agreement, and B2C cases, would then fall within the scope of the Rules (and the mandate of the Working Group to cover both B2B and B2C cases would be respected). This approach would, it was said, not interfere with prohibitions of binding pre-dispute agreements to arbitrate so far as consumers were concerned. An alternative approach was that separate Rules for B2B and B2C cases could be contemplated. However, the objections of some delegations to such an approach were recalled.

124. On the other hand, it was queried whether the third proposal would in fact permit pre-dispute agreements to arbitrate, as such a feature did not appear in this iteration of the text of the Rules.

125. It was also explained that the proposed guidance for the ODR administrator in paragraph 84 above was the core of the third proposal, and that it was designed to reflect the parties' agreement. Accordingly, it was confirmed that without a pre-dispute agreement to arbitrate, there could be no move to arbitration without a second click.

126. Another view was that the proposal reflected contractual arrangements and such would not interfere with arbitration regulations recognizing pre-dispute agreements to arbitrate, as such regulations would respect party autonomy in such matters.

127. Reference was also made to the flow chart contained in paragraph 72 of the Working Group's Report into its thirtieth session (A/CN.9/827), in which the chronology underlying the proposal was set out. Consequently, it was suggested, the provisions in the draft Guidance should be located prior to the provisions in draft article 7 (Arbitration).

128. A further query was raised regarding how the provisions referring to notices to be issued by the neutral in items 2-4 would operate in practice. In response, it was explained that, after the expiry of the facilitated settlement stage, the parties would notify the ODR administrator of their intentions for the final determination procedure, which would enable the neutral to issue the notices concerned. A further query was why a neutral would need to be appointed separately at the final determination stage, as the Rules elsewhere contemplated an appointment continuing after the facilitated settlement stage unless an objection to such continuation was raised.

129. It was recalled that the aim of the third proposal was to support the rapidly rising amount of e-commerce and the consequent need for cross-border ODR procedures that reflected international practice in this field. In this regard, the experience of China in this field through consumer protection associations and in international commercial arbitration was shared. It was noted that recent experience in ODR in China had generally not included arbitration as a forum to resolve disputes, which might be explained by the fact that arbitration and the enforcement of arbitral awards involved strict procedures. These procedures, it was added, were not suitable for low-value cases especially those involving consumers and MSMEs. In addition, it was said, the costs of traditional arbitration procedure were high and small cases might not be of interest to existing arbitral institutions.

130. It was emphasized that the proposal was not intended to affect the validity of any agreements between the parties (and, as the Rules expressly provided, they would not affect any provision of law from which the parties could not derogate), matters that the ODR administrator — when providing appropriate guidance — would take into account. Thus valid pre-dispute agreements to arbitrate would be determined according to applicable laws. It was said that the Rules themselves would not expressly provide that the parties could agree, pre-dispute, to arbitration.

131. It was therefore suggested that the scope of application of the Rules could be adjusted to exclude B2B cases where there was a pre-dispute agreement to arbitrate, which would mean that (a) all consumer cases fell under the ODR Rules and (b) B2B cases without such an agreement would also fall under the Rules.

132. One view of the third proposal was that the existence of options at the expiry of the facilitated settlement stage logically excluded a pre-dispute agreement to arbitrate. As the Rules did not distinguish between B2B and B2C transactions, a "second click" would be required in any event.

133. Another view was that parties that had concluded a pre-dispute agreement to arbitrate would ipso facto have excluded the operation of the Rules.

134. A further view was that the third proposal would in fact permit valid pre-dispute agreements to arbitrate in both B2C and B2B cases.

135. It was queried, in that regard, how a dispute resolution clause in the original transaction that stipulated the Rules as an ODR mechanism and arbitration as the final determination procedure would be construed. There might be a risk of contradictory clauses, it was said. One interpretation postulated was that as the Rules were contained in a dispute resolution clause that was separate from the transaction, it could be presumed that such a separate dispute resolution clause would override any conflicting provision in the transaction contract.

136. Another view of the proposal was that a valid pre-dispute resolution clause providing for arbitration would be given effect under the Rules, whether in a B2B or B2C case.

137. It was stated that the Rules would not be useable in practice without a clear understanding of their scope and application. Another view was that dispute resolution clauses were interpreted differently in different jurisdictions, and local guidance to reflect local law and regulations would be needed. Accordingly, it was said, some element of ambiguity should not prevent consensus on the provisions of the Rules. The proponents of the third proposal, on the other hand, stated that the Rules combined with applicable laws (including consumer protection and arbitration laws) would ensure a predictable result and in an efficient system appropriate for the e-commerce environment.

138. It was recalled that the main outstanding issue arose in that, in a significant number of jurisdictions, pre-dispute agreements to arbitrate were not enforceable so far as consumers were concerned. The Rules should not address considerations of the validity of such agreements themselves, it was said, and that there were two options available to the Working Group to avoid so doing.

139. One option, it was stated, would be to adjust the Rules to this consumer standard, and construe the Rules accordingly (as one of the interpretations above made clear). If the parties then chose a post-dispute agreement to arbitrate, that would be a valid agreement. A second option would be to separate the B2C cases in these jurisdictions or generally from B2B cases, as compromise proposals had sought to do.

140. It was added that the difficulties in accommodating B2B and B2C cases meant that a third option was to simplify the mechanism so that it could be adapted for all situations. Purchasers would understand that if there were a dispute, the first step would be to try to negotiate a solution; any second stage would involve assistance in to facilitate settlement, and any third step would involve a procedurally more complex procedure (whether that procedure was recommendation or arbitration). The costs of each transaction should be de minimis, it was added. As regards the procedures themselves, the parties should disclose all relevant information to allow the neutral to decide the issues at hand and no more.

141. The European Union presented a further proposal.

E. Proposal by the European Union regarding the implementation of the third proposal (the “second click proposal”)

142. **Model dispute resolution clause**

Disputes arising out of the contract [*description of the contract*] and falling within the scope of the UNCITRAL ODR Rules and relating to the following claims:

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the contract; or

(b) That full payment was not received for goods or services provided shall be resolved through ODR proceedings in accordance with the UNCITRAL ODR Rules.

The ODR administrator shall be [*name, business address (location) and electronic address of the responsible ODR administrator*]. Communications in the course of the ODR proceedings shall be communicated via the ODR platform [*name and electronic address of the ODR platform and indication of the name and location of the entity responsible for the platform*].

The place of ODR proceedings shall be [*indication of the place and/or indication on how this place is determined*].

Possible additional paragraph:

The language of proceedings shall be [*indication of language(s) in accordance with article pertaining to language in the ODR Rules*].

143. **Draft article 1 (Scope of application), paragraph 1 bis**

Explicit agreement referred to in paragraph 1 requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under the Rules [~~and whether Track I or Track II of the Rules apply to that dispute~~] *(the "dispute resolution clause")*.

144. **Draft article 6 (Facilitated settlement), paragraph 3**

If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the "expiry of the facilitated settlement stage"), the final stage of proceedings shall ~~commence~~ be conducted pursuant to article 7A~~7~~ (Recommendation by a neutral), unless the parties explicitly agree, following guidance of the ODR Administrator in accordance with draft Article 6A, that the final stage of proceedings shall be conducted pursuant to article 7B (Arbitration).

145. **Draft Article 6A (Guidance of the ODR Administrator)**

The ODR administrator shall inform the parties of the legal consequences of the proceedings pursuant to article 7A and article 7B.

146. **Comment**

The guidelines for ODR Administrators will contain standard information on the different legal consequences, in particular that proceedings under Article 7B lead to a procedural outcome that produces res judicata effect and hence blocks the parties' access to the courts, whereas the proceedings under Article 7A lead to a procedural outcome that does not produce res judicata effect and therefore does not block the parties' access to the courts.

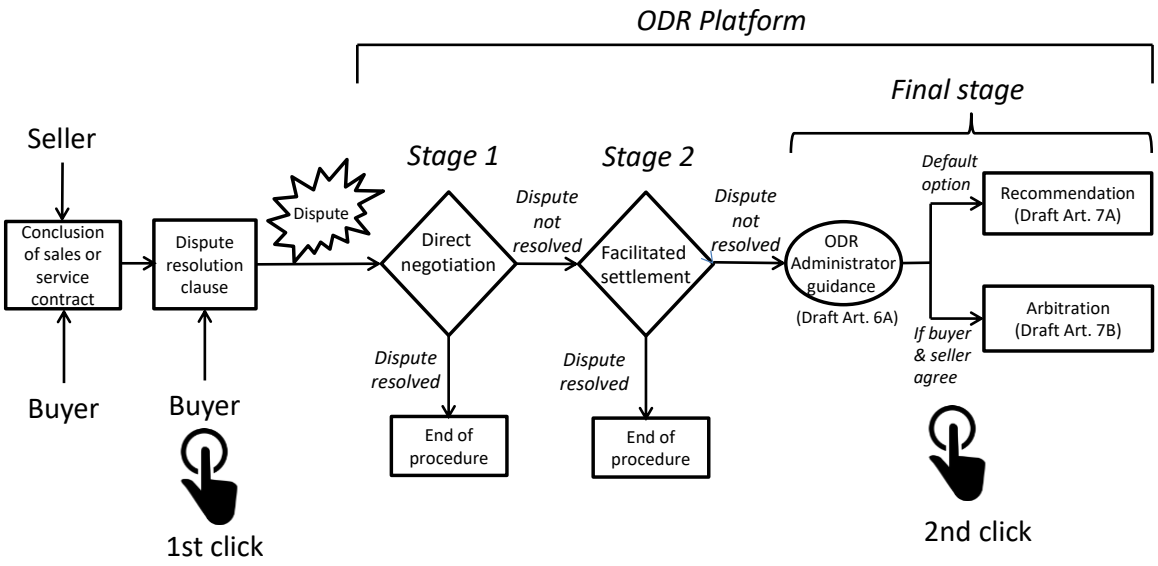
147. **Draft Article 7A (Recommendation by a neutral)**

(cf. draft Article 7 of Track II, WP.130)

148. **Draft Article 7B (Arbitration)**

(cf. draft Article 7 of Track I, WP.133)

149. **Diagram**



150. It was underscored that the third proposal would be supported by certain delegations if interpreted in accordance with the approach set out in this latest proposal, of which an integral element was a post-dispute agreement regarding the final determination stage.

151. It was observed that the European Union proposal was therefore very similar to the third proposal, and that it sought to clarify some aspects of the third proposal. The main difference between the two proposals, it was noted, was that the European Union proposal was based on the current text of Track II (set out in A/CN.9/WG.III/WP.130) and was less detailed in the practical application of the "second click".

152. Reference was made to the diagram at paragraph 149, and it was queried whether the European Union proposal was in conformity with the third proposal in that a "second click" was required. In response, the proponents of the third proposal confirmed that the diagram correctly clarified the third proposal in this regard. It was further queried whether this would be the case even if there were a pre-dispute agreement to arbitrate. In response, it was stated that the third proposal did not affect the validity of the pre-dispute agreement to arbitrate, which would be determined by applicable law.

153. In light of the above, it was suggested that other approaches might need to be considered, or indeed whether it might be the case that there was no workable solution to the issue. Options could include separating B2B and B2C cases, or confining the Rules to B2C cases, which would require the Working Group to request the Commission to modify the mandate; another would be to leave the language of the third proposal as currently drafted, allowing users to interpret the provisions as they saw fit; another option would be to have different Rules for online arbitration, which would indicate that consultations with UNCITRAL's Working Group II would be appropriate.

154. In addition, the following observations were made:

(a) That the Working Group had progressed on from the two-track system to consider the third proposal;

(b) Confining the Rules to B2C cases might not be commensurate with the overall scope of UNCITRAL's work, but that this would be an issue for the Commission, which had already considered the question and resolved it by referring to low-value claims; and

(c) The different interpretations of the *Draft Guidance of ODR Arbitrator regarding article 7* as set out in the Proposal from China (paragraph 84 above), meant that the third proposal as it stood would not provide a solution as it would not lead to certainty on a crucial point of the Rules.

155. Following the above comments, reference was made to the statement in paragraph 15 of the Working Group's thirtieth session (A/CN.9/827), in which it was noted that there were fundamental differences relating to the validity of pre-dispute agreements to arbitrate. It was stated that the above discussion demonstrated that those differences remained. Consequently, it was said, despite strenuous efforts of the Working Group and the various constructive proposals submitted, it did not appear that consensus could be achieved. In addition, a decision of the Commission in 2013 was recalled, concerning the importance of taking a strategic approach to the allocation of UNCITRAL's scarce resources and of undertaking legislative development on those topics on which it was likely that consensus could be achieved (A/68/17, paras. 294 and 297). It was therefore suggested that the Working Group should recommend to the Commission that the mandate of the Working Group to work on the Rules be terminated.

156. The enormous efforts of the Working Group to come to consensus were underscored, and it was added that the deliberations in the Working Group had nonetheless been important in furthering the development of ODR, whose value for the development of electronic commerce worldwide was again emphasized.

157. An alternative view was that the third proposal could lead to consensus; that consensus was appearing to be closer, and work on the third proposal should continue. In this regard, it was recalled that the third proposal had been based on attempts to find a simple, effective and efficient solution that would lead to universally-acceptable ODR Rules. Its proponents acknowledged, however, that there were different interpretations of the proposal, but they agreed that attempts to seek consensus should continue.

158. A further suggestion was that those attempts should continue with appropriate limitations on the scope of the Rules. It was added that the breadth of the types of transactions and jurisdictions to be accommodated was such that greater clarity from the Commission would be helpful as regards whether low-value claims and what might be a broader group of business claims should both be accommodated.

159. It was noted that issues of scope would need to be considered by the Commission and that the third proposal remained to be considered by the Working Group. The Working Group was therefore invited to consider the modifications to the third proposal made earlier in the session, with a view to concluding its deliberations on the proposal. In this context, the importance of the topic of ODR to the growth of e-commerce was again emphasized.

F. Private enforcement mechanisms

160. The Working Group deferred its consideration of the proposal contained in A/CN.9/WG.III/WP.134. The Working Group considered, however, the question of private enforcement measures more generally. It was recalled that these measures were intended to give effect to the neutral's recommendation, and observed that they might also be relevant for any arbitral award under the Rules (noting that, in the context of a low value claim, enforcement might not be sought through judicial enforcement).

161. An initial issue was whether the term "recommendation" should be maintained. It was agreed that clarity in the meaning of this description of the outcome of this final stage of the proceedings was vital, and that a definition of the term would be required to include both that the outcome would not have res judicata effect and that it would be capable of implementation through the use of applicable enforcement mechanisms. It was added that the term should not be defined in a way that was contrary to its normal understanding, to avoid confusion.

162. Alternative suggested terms included "direction", "decision", "adjudication" or "determination". Comments on these alternative terms included that the term "recommendation" might have connotations of an option rather than a final or conclusive determination; that some of the other terms might have legal connotations that made them less accessible to lay parties. Another view was that the term "recommendation" itself might lead to confusion among those who were not lawyers.

163. The history of the Working Group's deliberations when selecting the term "recommendation" was also recalled. Arguments were made to the effect that the term should be a robust one, so as to convey the impression that the final outcome was not one that the parties were free to accept or reject. After further discussion, there was no consensus to change the term "recommendation" and the Secretariat was instructed to consider providing for the definition of this item in the next iteration of the Rules.

V. Intersessional consultations

164. There was support for a suggestion that a smaller group of States, in which any participant in the Working Group might take part, could be constituted to seek to agree a way forward on outstanding issues. The Secretariat offered to facilitate such interaction, with a view to enhancing constructive discussion at the Commission session, and would operate in as transparent a manner as practicable, with due respect for all official United Nations languages to the extent possible.

E. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)

(A/CN.9/WG.III/WP.133 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution ("ODR") relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] At its forty-fourth (Vienna, 27 June-8 July 2011),[2] forty-fifth (New York, 25 June-6 July 2012), [3] forty-sixth (Vienna, 8-26 July 2013) [4] and forty-seventh (New York, 7-19 July 2014)[5] sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the "Rules"), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions. From its twenty-third (New York, 23-27 May 2011) to twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group has considered the content of the draft Rules.

3. At its twenty-sixth session (Vienna, 5-9 November 2012), the Working Group identified that two tracks in the Rules might be required in order to accommodate

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.
[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.
[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.
[4] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.
[5] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.

jurisdictions in which agreements to arbitrate concluded prior to a dispute are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

4. At its twenty-seventh session (New York, 20-24 May 2013), the Working Group considered a proposal to implement a two-track system, one track of which would end in a binding arbitration phase ("Track I"), and one track of which would not ("Track II"). It also considered the draft text of Track I of the Rules, as contained in document A/CN.9/WG.III/WP.119 and its addendum.

5. At its twenty-eighth (Vienna, 18-22 November 2013) and twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group proceeded to consider the draft text of Track II of the Rules, contained in document A/CN.9/WG.III/WP.123/Add.1, and document A/CN.9/WG.III/WP.127 and its addendum, respectively.

6. At its forty-seventh session, the Commission agreed that the Working Group should at its thirtieth session address the text of Track I of the Rules, as well as the issues identified in paragraph 222 of the report of the forty-sixth session of the Commission, [6] some of which were further addressed in document A/CN.9/WG.III/WP.125, a proposal by the Governments of Colombia, Honduras, Kenya and the United States of America, and should continue to achieve practical solutions to open questions. [7] Accordingly, at its thirtieth session, the Working Group considered the text of Track I of the Rules contained in document A/CN.9/WG.III/WP.131, and heard various proposals thereon.

7. This note sets out a revised draft text for Track I of the Rules based on the draft before the Working Group at its thirtieth session in document A/CN.9/WG.III/WP.131, as proposed to be amended by the third proposal submitted at the that session (A/CN.9/827, paras. 58-80). For the ease of the reader, the remarks explaining the derivation of the draft in A/CN.9/WG.III/WP.131 have not been repeated, save footnotes that indicate where decisions of the Working Group remain outstanding. The draft text below also sets out the alternative formulations in the first, second and fourth proposals regarding Track I of the Rules after the formulation in the third proposal (see, further, A/CN.9/827, paras. 58-69 and 75-102).

8. The Working Group reported at that session that despite strenuous efforts from all participants to come to consensus, fundamental differences between States that allowed binding pre-dispute agreements to arbitrate and others remained, and that further progress on the Rules would require the Working Group to find ways to bridge those differences (A/CN.9/827, paras. 15, 37 and 69). The draft text for Track I of the Rules is therefore followed by a summary of the issues that give rise to the differences concerned (see A/CN.9/WG.III/WP.133/Add.1), which the Working Group may wish to use to assess the extent to which differences remain and can be bridged, and so to report on its progress to the Commission.

II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

9. In paragraph 8 of A/CN.9/WG.III/WP.131, the Working Group was invited to consider the extent to which Track I can or ought to reflect the same provisions as Track II, diverging only at the final stage of proceedings. The discussions of the Working Group at the thirtieth session indicated that this issue would be considered at a future time.

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[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17).

[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 138-140.

Model dispute resolution clause

10. The Working Group heard a proposal to include, in transactions to be subject to the Rules, a model dispute resolution clause in the following terms:

"*Subject to the provisions of Article 1(a) of the UNCITRAL ODR Track I Rules, any dispute, controversy or claim arising hereunder and within the scope of the UNCITRAL ODR Track I Rules providing for a dispute resolution process ending in a binding arbitration, shall be settled by arbitration in accordance with the UNCITRAL ODR Track I Rules presently in force*".[8]

B. Draft preamble

11. "*1. The UNCITRAL online dispute resolution rules (the "Rules") are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.*

[2. The Rules are designed to provide an easy, fast, cost-effective procedure for dispute resolution in low-value, high-volume electronic commerce transactions.]

[3. The Rules are designed to create a safe, predictable legal environment for transactions, to ensure traders' confidence in the online market.]

[4. The Rules are designed to be able to facilitate micro, small and medium-sized enterprises' access to international markets through electronic commerce and mobile electronic commerce.][9]

["5. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix]:

[(a) Guidelines and minimum requirements for online dispute resolution platforms/administrators;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[…]."

C. Draft procedural rules — Track I[10]

1. Introductory rules

12. **Draft article 1 (Scope of application)**

Paragraph 1

"*1(a). The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have, at the time of a transaction,*

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[8] A/CN.9/827, para. 64 (part of the second proposal). The proponents also suggested an equivalent change for Track II of the Rules, as follows: "Where, in the event of a dispute arising hereunder and within the scope of the UNCITRAL ODR Track II Rules providing for a dispute resolution process ending in a non-binding recommendation, the parties wish to seek an amicable settlement of that dispute, the dispute shall be referred for negotiation, and in the event that negotiation fails, facilitated settlement, in accordance with the UNCITRAL ODR Track II Rules presently in force."

[9] Regarding draft paragraphs 2, 3 and 4, see the third proposal, "The Purpose and Principles of Drafting", A/CN.9/827, para. 72.

[10] For the equivalent procedural rules for Track II, see A/CN.9/WG.III/WP.130. For a discussion of streaming mechanisms that would place purchasers on either Track, see A/CN.9/WG.III/WP.130.

explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

[1(b). Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer[11] *that disputes relating to the transaction and falling within the scope of the Rules will be exclusively resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the "dispute resolution clause").*"]

Alternative formulations for paragraph 1(b)

(i) Second proposal (A/CN.9/827, para. 63)

["*1(b). These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen. For buyers who are located in certain States at the time of the transaction, a binding arbitration agreement capable of resulting in an enforceable award requires that the agreement to use the Track I Rules take place after the dispute has arisen*."

Accompanied by a footnote to read: "Pre-dispute arbitration agreements with certain buyers might not be considered valid under applicable national law in some jurisdictions, and consequently, awards arising out of such agreements might not be enforceable against a purchaser in those jurisdictions".]

(ii) Fourth proposal (A/CN.9/827, para. 75)

["*1(b). Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer (a) that disputes relating to the transaction and falling within the scope of the Rules, will be exclusively resolved through ODR proceedings under these Rules and whether track I or track II of the Rules apply to that dispute ("the dispute resolution clause") and (b) for buyers whose billing address is in a state listed in the designated website, that in certain states, including the state of the buyer's billing address, a binding arbitration agreement capable of resulting in an enforceable award, requires that the agreement to use Track I take place after the dispute has arisen*."[12]

Accompanied by a footnote to read: "Pre-dispute arbitration agreements with certain buyers might not be considered valid under applicable national law in some jurisdictions, and consequently, awards arising out of such agreements might not be enforceable against a purchaser in those jurisdictions".]

Paragraph 2

"*2. These Rules shall only apply to claims:*

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the sales or service contract referred to in paragraph 1 (a); or

(b) That full payment was not received for goods or services provided.

[11] The more recent proposals have included the term "buyer". In A/CN.9/WG.III/WP.131, para. 57, the Working Group's attention was drawn to the fact that the term "buyer" had not been used in the Rules and lacked consistency with other provisions. The Working Group may therefore wish to consider the use of this term in the Rules: it appears in draft Articles 1(a), 1(b), and 15.

[12] It was also proposed that this paragraph should be accompanied by guidance for ODR administrators to check the purchaser's location, relying on mailing address or billing address, and advise vendors that they should consider the appropriateness of pursuing binding arbitration accordingly (A/CN.9/827, para. 75).

Paragraph 3

["*3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail*."]

Alternative formulation for paragraph 3 (second proposal, A/CN.9/827, para. 68)

["*3. These Rules shall govern the ODR proceedings except where any of the Rules is in conflict with a provision of applicable law from which either of the parties cannot derogate*."]

13. **Draft article 2 (Definitions)**

"*For purposes of these Rules:*

ODR

"*1. 'ODR' means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology*.

"*2. 'ODR administrator' means the entity [specified in the dispute resolution clause] that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform*.

"*3. 'ODR platform' means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules*.

Parties

"*4. 'Claimant' means any party initiating ODR proceedings under the Rules by issuing a notice*.

"*5. 'Respondent' means any party to whom the notice is directed*.

[TBD]

["5a. 'Consumer' means a natural person who is acting primarily for personal, family or household purposes.]

Neutral

"*6. 'Neutral' means an individual that assists the parties in settling or resolving the dispute*.

Communication

"*7. 'Communication' means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means*.

"*8. '[Designated] electronic address' means an information system, or portion thereof, [designated] by the parties to the online dispute resolution process to exchange communications related to that process*."

14. **Draft article 3 (Communications)**

"*1. All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform shall be designated in the dispute resolution clause. Each party shall [designate] [provide the ODR administrator with] [a designated] electronic address*.

"*2. A communication shall be deemed to have been received when, following communication to the ODR administrator in accordance with paragraph 1, the ODR administrator notifies the parties of the availability thereof in accordance with paragraph 4. [The time of receipt of an electronic communication is the*

time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.]

"*3. The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral [at their electronic addresses].*

"*4. The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform.*

"*5. The ODR administrator shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the arbitration stage of proceedings*."

2. Commencement

15. Draft article 4A (Notice)

"*1. The claimant shall communicate to the ODR administrator a notice in accordance with paragraph 4. [The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.]*

"*2. The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.*

"*3. ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph 1, the ODR administrator notifies the parties of the availability of the notice at the ODR platform*.

"*4. The notice shall include:*

"(a) The name and [designated] electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

"(b) The name and [designated] electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

"*(c) The grounds on which the claim is made;*

"*(d) Any solutions proposed to resolve the dispute;*

[*"(e) A statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;]*

[*"(f) The location of the claimant];*

"*(g) The claimant's preferred language of proceedings;*

"*(h) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.*

[*"5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim, and also information in relation to the pursuit of other legal remedies*."][13]

[13] The Working Group may wish to note that paragraph (5) has been inserted in square brackets for its consideration, and reflects a modification made to article 4A in Track II proceedings. Should the Working Group determine that paragraph (5) ought to be retained, it is suggested to delete the second sentence of paragraph (1) as redundant. In any event, the inclusion of subparagraph (e) and the intended legal consequences of that subparagraph might warrant additional consideration by the Working Group; a similar provision was deleted in respect of Track II proceedings.

16. **Draft article 4B (Response)**

"*1. The respondent shall communicate to the ODR administrator a response to the notice in accordance with paragraph 2 within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform. [The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.]*

"*2. The response shall include:*

"*(a) The name and [designated] electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;*

"*(b) A response to the grounds on which the claim is made;*

"*(c) Any solutions proposed to resolve the dispute;*

"*[(d) A statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;]*

"*[(e) The location of the respondent;]*

"*[(f) Whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]*

"*[(g) the signature or other means of identification and authentication of the respondent and/or the respondent's representative.]*

["*3. The respondent may provide, at the time it submits its notice, any other relevant information, including information in support of its response, and also information in relation to the pursuit of other legal remedies*."][14]

17. [**Draft article 4C (Counterclaim)**

"*1. The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise out of the same transaction as the claimant's claim. A counterclaim shall include the information in article 4A, paragraphs (4)(c) and (d)*.

"*2. The claimant may respond to any counterclaim within [seven (7)] calendar days of being notified of the existence of the response and counterclaim on the ODR platform. A response to the counterclaim must include the information in article 4B, paragraphs (4)(b) and (c)*."]

3. Negotiation

18. **Draft article 5 (Negotiation)**

Commencement of the negotiation stage

"*1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR administrator, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and*

[14] A new paragraph (3) has been inserted in square brackets, and reflects a modification made to article 4B in Track II proceedings. Similar to the discussion set out in the preceding footnote, the Working Group might wish to review this provision having regard also to the second sentence of paragraph (1) and paragraph (2)(d).

notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph 2, whichever is earlier.

"*2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform*.

Commencement of the facilitated settlement stage

"*3. If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence*.

"*4. If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence*.

Extension of time

"*5. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days*."[15]

4. Facilitated settlement

19. **Draft article 6 (Facilitated settlement)**

"*1. Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)]*.

"*2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement*.

"*3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) the ODR proceedings shall move to the final stage of proceedings pursuant to draft article 7(Guidance of ODR Administrator)*."

20. **Draft article 6 bis** (fourth proposal, A/CN.9/827, para. 76)

"*1. If the dispute resolution clause provides that Track I of the Rules applies and the buyer's billing address is not in a state listed in the designated website, or if it provides that Track II of the Rules applies, then the proceedings shall move to the applicable track pursuant to articles […]*.

2. If the dispute resolution clause provides that Track I of the Rules applies, and the buyer's billing address is in a State listed in the designated website, the ODR administrator may suggest measures to address the situation."

5. Arbitration

21. **Draft article 7 (Arbitration)**

"*1. At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made.*

[15] In relation to paragraph (5), the Working Group may wish to recall that in Track II proceedings, it retained the phrase "for reaching settlement" and deleted the phrase "for the filing of the response". It is suggested that a similar approach could be adopted in Track I.

Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

"*2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.*

"*3. The neutral shall evaluate the dispute based on the information submitted by the parties[, and having regard to the terms of the agreement,] and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be recorded on the ODR platform.*

"*4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.*

"*4 bis. The requirement in paragraph 3 for:*

(a) The award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) The award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.

"*5. The award shall state brief grounds upon which it is based.*

"*6. The award shall be rendered promptly, preferably within ten calendar days [from a specified point in proceedings].*

"*6. bis. 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.*

"*7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.*

"*8. In all cases, the neutral shall decide [ex aequo et bono], in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction].*"

22. [***Draft Guidance of ODR Administrator regarding article 7 (proposed as part of the third proposal, A/CN.9/827, para. 72)***]

"*If the Neutral has not succeeded in facilitating a settlement at the expiry of the facilitated settlement stage，the ODR administrator shall, on the basis of information submitted by the parties, present to the parties the following options, and ensure that they are aware of the legal consequences of the choice of each track:*

(1) Arbitration (as referred to in draft article 7 of Track I);

(2) The Neutral's recommendation (as referred to in Track II);

(3) ..."]

23. [**Draft article 7 (bis) Correction of award**

"*Within [five (5)] calendar days [after the receipt of the award], a party, with notice to the other party, may request the neutral 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 neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefor] within [two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of the*

award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.]]"[16]

24. [**Draft article 7 (ter) Internal review mechanism**

"*1. Either party may request annulment of the award within ten (10) calendar days of the communication of the award, by application to the ODR administrator, on the grounds that (a) the place of arbitration unfairly prejudiced that party; or (b) there has been a serious departure from a fundamental rule of procedure prejudicing that party's right to due process*.

"*2. The ODR administrator shall appoint a neutral unaffiliated with the ODR proceedings the subject of the request to assess the request within five (5) calendar days. Once the neutral is appointed, the ODR administrator shall notify the parties of such appointment*.

"*3. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral appointed in accordance with article 6*."]

6. Settlement

25. **Draft article 8 (Settlement)**

"*If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate*."

7. Neutral

26. **Draft article 9 (Appointment of neutral)**

"*1. The ODR administrator shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR administrator shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral*.

"*2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules*.

"*3. The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the ODR administrator. The ODR administrator shall promptly communicate such information to the parties*.

Objections to the appointment of a neutral

"*4. Either party may object to the neutral's appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings*.

"*5. Where a party objects to the appointment of a neutral under paragraph 4(i), that neutral shall be automatically disqualified and another*

[16] The Working Group may wish to consider replacing the language "after the receipt of the award" with the phrase "after the award is communicated to the parties", in order to better reflect the language in article 7(3). The Working Group may also wish further to consider linking this language to the provisions on receipt and deemed receipt in article 3.

appointed in his or her place by the ODR administrator. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR administrator will be final, subject to paragraph 4(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph 4(ii).

"*6. Where a party objects to the appointment of a neutral under subparagraph 4(ii) above, the ODR administrator shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.*

["*7. In the event both parties object to the appointment of a neutral under paragraph 4(i) or 4(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator, notwithstanding the number of challenges that has been made by either party.*]

Objections to provision of information

"*8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR administrator to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR administrator shall convey the full set of existing information on the ODR platform to the neutral.*

Number of neutrals

"*9. The number of neutrals shall be one.*"

27. **Draft article 10 (Resignation or replacement of neutral)**

"*If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR administrator shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.*"

28. **Draft article 11 (Power of the neutral)**

"*1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*

"*1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.*

"*2. Subject to any objections under article 9, paragraph 8, the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings[, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.*][17]

"*3. At any time during the proceedings the neutral may [require] [request] or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.*

"*4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral*

[17] It is suggested that, in accordance with changes made in relation to Track II proceedings, the square bracketed text in paragraph (2) be deleted.

that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.

"*5. The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules*."

8. General provisions

29. [**Draft article 12 — Deadlines**

"*The ODR administrator, or, if relevant, the neutral, shall notify parties of all relevant deadlines during the course of proceedings*."]

30. **Draft article 13 (Dispute resolution clause)**

"*The ODR platform and ODR administrator shall be specified in the dispute resolution clause*."

31. **Draft article 14 (Place of proceedings)**

"[*The ODR administrator shall select the place of proceedings, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules*.]"[18]

32. **Draft article 15 (Language of proceedings)**

"*The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)] [the offer for ODR proceedings accepted by the buyer].*[19] *In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select*."

33. **Draft article 16 (Representation)**

"*A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR administrator*."

34. **Draft article 17 (Exclusion of liability)**

"[*Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR administrator and neutral based on any act or omission in connection with the ODR proceedings under the Rules*.]"

35. **Draft article 18 (Costs)**

"*The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs*."[20]

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[18] Article 14 (formerly article 10) has been relocated from the subheading "Arbitration" to "General Provisions". Article 14 has not yet been considered by the Working Group.

[19] The phrase "the offer for ODR proceedings" is not a defined term, and introduces a lack of clarity and an increased complexity in the draft, raising questions such as when an offer for proceedings has been made, and when acceptance has been proffered. The Working Group may consequently wish to consider alternative language, such as: "The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)] …", inserted in square brackets as an alternative (see A/CN.9/WG.III/WP.130/Add.1, para. 16). See, also, footnote 10 above regarding the use of the term "buyer".

[20] In its consideration of the text of Track II proceedings, the Working Group agreed to use the word "decision" rather than "award" in the provision on costs: A/CN.9/801, paragraphs 161-163. The Working Group has not yet considered article 18 (formerly article 15) in relation to Track I proceedings.

36. [**Draft article 17 (Fees of ODR proceedings)**

"*The fees of ODR proceedings shall be reasonable in amount, and made available to the parties in advance of proceedings*."][21]

37. [**Annex X/list on designated website**

[*List of jurisdictions which would opt in to inclusion in such an Annex or listing on designated website*]

[21] At its twenty-ninth session, the Working Group agreed that the Rules could address in a new provision the need for fees levied by ODR administrators or platforms to be reasonable (A/CN.9/801, para. 164).

(A/CN.9/WG.III/WP.133/Add.1) (Original: English)

Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)

ADDENDUM

Contents

III. Addressing differences between the views underlying the proposals for Tracks I and II of the Rules and streaming purchasers onto one or other Track

A. General remarks

1. At its thirtieth session, the Working Group considered four main proposals that would address, inter alia, the manner in which purchasers under the Rules would be directed to the applicable Track of the Rules for resolution of any claim thereunder ("streaming"). Document A/CN.9/WG.III/WP.133 sets out the proposals themselves, as they would be reflected in a draft of Track I of the Rules.

2. The Working Group may consider that a proposal can be complete — and so can be the basis for the Rules — only insofar as it is clear when streaming will occur, which person or system designates the relevant track, and upon what basis that designation is made.

3. In the light of the fundamental differences between States that allow binding pre-dispute agreements to arbitrate and those that do not, and the difficulty in assessing four proposals for streaming simultaneously, this Note seeks, therefore, to clarify the extent to which, and how, each proposal addresses streaming. This Note then addresses certain issues of implementation.[1]

4. All four proposals envisage an Annex to the Rules or a similar listing to identify jurisdictions that do not permit consumers to agree to binding arbitration before a dispute arises. Although only the first proposal envisages a formal Annex to the Rules, the jurisdictions concerned are referred to in the remainder of this Note using the shorthand term "Annex jurisdictions". This term is not, however, intended to imply any particular form of listing or Annex and is used for convenience only.

5. This Note summarizes the Secretariat's understanding of how each proposal addresses streaming at the following stages of a transaction and/or dispute:

(a) At the time of, and as part of, the transaction;

(b) At the time a dispute arises and/or at the final adjudication stage.

6. The Secretariat's understanding of the four proposals is based on the Working Group's deliberations at its thirtieth session. Those deliberations address streaming through a mechanism indicating whether and when Track I might apply to any dispute, based on proposed language for Article 1, paragraph (1)(b), and certain other provisions of the Rules as set out in A/CN.9/WG.III/WP.133. The Working Group

[1] Other issues are denominated using square brackets in, and footnotes to, the proposals themselves in A/CN.9/WG.III/WP.133. Issues of implementation not addressed in this Note, and to be discussed by the Working Group at a future time, include the enforcement of final awards.

may wish to consider as an initial step whether the Secretariat's understanding of the proposals is correct.

B. Streaming: determination of the applicable Track of the Rules

1. At the time of, and as part of, the transaction

(a) The first proposal

7. The first proposal provides that the merchant's online purchase system automatically generates a dispute resolution clause, to the effect that any dispute will be settled under the Rules, and more particularly under which Track of the Rules. If a purchaser is a consumer and provides a billing and/or shipping address from an Annex jurisdiction, the system generates a dispute resolution clause mandating Track II of the Rules. For all other purchasers, the system generates a dispute resolution clause mandating Track I of the Rules.

8. Thus the first proposal determines the applicable Track of the Rules at the transaction stage, assuming that an Annex is in place and that there is a mechanism for identifying whether a purchaser is a "consumer". However, the following questions are outstanding:

(a) How are States to categorize their national consumer protection law and to advise businesses on the implications of the Annex (see, further, para. 61 of A/CN.9/827)?

(b) Who is responsible for the determination of the status of a purchaser, i.e. whether or not he or she is a "consumer", and how are errors in ascribing status to be addressed?

(c) Which address or addresses will be treated as determinative of jurisdiction? and

(d) Is the designation of Track II binding — that is, can a consumer from an Annex jurisdiction elect, at the time of the dispute or later, that the final adjudication be under Track I of the Rules? How might a transfer between Tracks be effected, if so?[2]

(b) The second proposal

9. The second proposal contemplates that the merchant issues a dispute resolution clause to the effect that any dispute will be settled under Track I of the Rules. However, the dispute clause is accompanied by a footnote that notes that such a clause and any arbitral award thereunder may not be enforceable against consumers located in Annex jurisdictions.

10. Thus the second proposal does not finally designate the applicable Track for all purchasers at the transaction stage.

(c) The third proposal

11. The third proposal contemplates that the merchant issues a dispute resolution clause to the effect that any dispute will be settled under the Rules, but whether or not it will designate the applicable Track is left in square brackets.

12. It is therefore unclear whether this proposal does or does not determine the applicable Track of the Rules at this stage.

(d) The fourth proposal

13. The fourth proposal contemplates that the merchant issues a dispute resolution clause that identifies whether any dispute will be settled under Track I or Track II of the Rules. However, the dispute clause is accompanied by a footnote that notes that

[2] See, further, paragraph 17 of A/CN.9/WG.III/WP.123.

any designation of Track I of the Rules, and any arbitral award thereunder, may not be enforceable against consumers located in certain jurisdictions to be identified on a website listing.

14. Thus the fourth proposal (similarly to the second proposal) does not finally designate the applicable Track at this stage for all purchasers.

2. At the time the dispute arises and/or at the final adjudication stage

(a) The first proposal

15. The applicable track having been determined at the transaction stage, the first proposal does not need to answer this question. However, the questions set out in paragraph 8 above remain outstanding, in that they allow for the possibility that a purchaser may need or may wish to be transferred onto another Track, in the case of error in ascribing address or the status of a consumer, or if a consumer from an Annex jurisdiction agrees to binding arbitration when the dispute arises.

(b) The second proposal

16. The second proposal contemplates that the final designation will be based on an agreement by a consumer in an Annex jurisdiction to binding arbitration made at the time of dispute if necessary. In other words, whether an earlier designation of Track I is to stand under this approach requires an assessment of whether the purchaser is or is not a consumer from an Annex jurisdiction.

17. The proponents note that this step would require guidance to ODR administrators regarding how to assess a purchaser's location and whether or not he or she is a consumer, relying on the billing and/or shipping address and other information provided by that purchaser.

18. It has also been observed that, in practice, the ODR administrator would need to consult a listing of jurisdictions to assess whether the purchaser concerned could have agreed to binding arbitration before a dispute has arisen. The proposal does not contemplate an Annex per se. If the purchaser is from an Annex jurisdiction, and is a consumer, an offer of binding arbitration at this stage would need to be made and accepted for binding arbitration to be a reliable final adjudication mechanism and if any award is to be capable of enforcement against the purchaser.[3] In default of an agreement between the parties as to the final adjudication mechanism, the ODR administrator would need to advise the merchant that any award is not reliable in this sense, and/or select Track II if a purchaser is a consumer and from an Annex jurisdiction.

19. Thus the ODR administrator takes over the function of an Annex and is required to assess whether purchasers are consumers from Annex jurisdictions. That assessment both requires an Annex or similar listing, and leaves uncertainty regarding which Track will in fact apply, and is also open to challenge should the ODR Administrator err in its assessment.

20. Thus the second proposal relies on information provided by the purchaser and the use of an Annex or similar listing, and to that extent does not designate with certainty the applicable Track for all purchasers at the time the dispute arises.

(c) The third proposal

21. The third proposal contemplates a streaming mechanism whereby the final designation is undertaken at the beginning of the final adjudication stage (using the mechanism proposed in draft article 6 of the Rules). In other respects, the practical steps involved are as the second proposal (and there is also an option for the determination to be made earlier in the process — i.e. at the time a dispute arises). Again, the proposal does not contemplate an Annex per se.

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[3] This Note does not address the requirements for such an award in fact to be enforceable against a consumer, nor what form enforcement might take.

22. As in the second proposal, the ODR administrator takes over the function of an Annex and is required to assess whether purchasers are consumers from Annex jurisdictions, and make appropriate recommendations.

23. Accordingly, the third proposal, as the second proposal, relies on information provided by the purchaser and the use of an Annex or similar listing, and to that extent does not designate with certainty the applicable Track for all purchasers at the time of final adjudication.

(d) The fourth proposal

24. The fourth proposal involves practical steps that are essentially the same as the second proposal, though the notion of an Annex is replaced by an informational listing on a designated website.

25. As for the third proposal, therefore, under the fourth proposal the ODR administrator takes over the function of an Annex and is required to assess whether purchasers are consumers from Annex jurisdictions, and make appropriate recommendations.

26. Accordingly, the fourth proposal, as the second and third proposals, relies on information provided by the purchaser and the use of an Annex or similar listing, and to that extent does not designate with certainty the applicable Track for all purchasers at the time the dispute arises. Indeed, the fourth proposal envisages that the list of jurisdictions that would be informational, non-exhaustive and non-binding in nature, and therefore the uncertainties and risk of challenge referred to above may be greater under this proposal.

C. Issues for deliberation by the Working Group

27. As all the proposals rely on an Annex or similar listing, the first issue that the Working Group may wish to consider is the potential requirements for such an Annex or equivalent listing.

28. The Working Group may recall that its deliberations on the notion of an Annex at the thirtieth session contemplated that the UNCITRAL Secretariat or other United Nations body such as the General Assembly would invite Member States to opt in or out of being listed in the Annex, and would repeat the invitation annually such that the Annex would remain reasonably current. As there is no secretariat to the General Assembly available to perform such a function, the alternative suggestion by the Working Group — that the UNCITRAL Secretariat take over this function — has been considered.

29. In order for the UNCITRAL Secretariat to consider discharging the function, (a) an explicit mandate would be needed from the Commission; (b) a consideration of possible liabilities and how they might be mitigated through privileges and immunities applying to the United Nations Secretariat would be necessary and (c) specific additional resources for the UNCITRAL Secretariat would need to be provided. For a discussion of similar issues regarding points (a) and (c) arising in Working Group II and regarding the establishment of a Transparency Registry, see the Reports of the Commission's forty-sixth and forty-seventh sessions (A/68/17, paras. 79-98 and A/69/17, paras. 107-110 respectively).[4] For a list of some of the issues that the Working Group or Commission might wish to consider in the context of a mandate and possible liabilities, some of which are also referred to above, see A/CN.9/WG.III/WP.123, paragraph 17.

30. Similar questions of resources and liabilities might arise if any body other than the Secretariat were to host an Annex (or similar listing, such as on a website), and

[4] Available at www.uncitral.org/uncitral/en/commission/sessions/46th.html and www.uncitral.org/uncitral/en/commission/sessions/47th.html.

as regards the ODR administrators' determinations based on them and information provided by purchasers.

31. Further issues for consideration relate to the designation of the status of the consumer, and how consumers might be prevented from being streamed onto the wrong Track of the Rules (see, further, subparas. 8(b) and 8(c) above and para. 17 of A/CN.9/WG.III/WP.123).

32. The proposals contemplate that ODR systems based on the Rules would operate in a clearly-defined way, but that the Rules are a non-binding set of recommendations. The Working Group may also wish to consider, therefore, how certain consumer protection mechanisms envisaged can be ensured through the use of the Rules.

33. Finally, and given the uncertainties noted above as to the applicable Track of the Rules in each of the proposals, the Working Group may wish to consider the provision of additional guidance to merchants regarding the mitigation of these uncertainties.

F. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: Proposal by the Governments of Colombia and the United States of America

(A/CN.9/WG.III/WP.134)

[Original: English]

Contents

1. The Governments of Colombia and the United States of America welcome the call for the Working Group to consider payment chargebacks as part of its work in developing instruments relating to online dispute resolution of low-value cross-border e-commerce consumer disputes. We propose that Working Group III link any non-binding recommendation under Track II of the Rules to a uniform mandatory payment system chargeback requirement.

I. Background

2. Working Group III is currently engaged in work on a two-track system, one track that would end in binding arbitration (Track I) and another that would end in a non-binding recommendation (Track II).

3. The delegations of Colombia and the United States believe that in order for any non-binding recommendation to provide sufficient consumer protection, the recommendation would need to be legally linked to the same money transfer payment channel as the original payment, given the general lack of judicial remedies in cross-border e-commerce transactions. [1] As the ODR colloquium that lead to the establishment of the Working Group highlighted, all the successful ODR programs of the last decade have been where enforcement of the outcome comes through the same money channel as the original payment.[2]

4. At its May 2013 session, the Working Group requested that the Secretariat provide an overview of private enforcement mechanisms, in the context of compliance with a neutral's non-binding recommendation under Track II of the draft

[1] A paper co-sponsored by the delegations of Colombia, Honduras, Kenya and the United States (A/CN.9/WG.III/WP.125) explains that arbitration is generally more consumer protective than a non-binding recommendation in cross-border transactions, given that court remedies are not generally available or may be impractical. ODR with binding arbitration as a "backstop" serves as a strong incentive to move the parties to voluntary resolution through negotiation or facilitated settlement.

[2] As discussed at the UNCITRAL ODR colloquium, PayPal and eBay have a private contractual form of chargebacks if the purchaser did not receive the product or it was not what was ordered. The dispute is resolved under the terms of the private contract with the merchant. This private system works because vendors maintain accounts with eBay and PayPal and funds can be frozen and automatically transferred consistent with the decision. Enforcement is similar to the ICANN Dispute resolution model in that ICANN under the terms of the contract can unilaterally change domain name registries. Report of UNCITRAL ODR colloquium, A/CN.9/706, paras. 30 and 43.

rules. A/CN.9/769, paragraphs 57 and 58. In response, the Secretariat prepared a paper addressing inter alia how chargebacks might be integrated into the procedural framework of the rules. A/CN.9/WG.III/WP.124, paragraphs 35-39 and 44.

5. At its October 2014 session, the Working Group decided to further examine the issue of private enforcement mechanisms in the context of the various formulated proposals. The Working Group specifically requested that the Secretariat prepare additional materials on chargebacks. The Government of Colombia further stated that it would submit a proposal for the February 2015 session of the Working Group concerning chargebacks, which, it pointed out is a private enforcement mechanism, practical and effective. A/CN.9/827, paragraphs 53 and 95.

II. Payment system chargebacks provide a powerful tool for resolution of cross-border e-commerce disputes

6. Chargebacks provide a flexible and effective legal framework for dealing with low-value cross-border e-commerce disputes, especially when coupled with an online dispute resolution mechanism, like the draft UNCITRAL ODR Rules. A chargeback legal framework provides many benefits including: (1) mandatory application to vendors through use of a payment channel (rather than voluntary application based on a private agreement with a specific ODR provider); (2) buyers may opt into the system post-dispute; (3) buyers do not waive court remedies; and (4) enforcement of a decision is guaranteed cross-border without costly court intervention.

7. The 1999 OECD Guidelines on E-Commerce recommend the use of "limitations of liability for unauthorized or fraudulent use of payment systems, and chargeback mechanisms [as] powerful tools to enhance consumer confidence." Available at www.oecd.org/dataoecd/18/13/34023235.pdf at 7.

8. These ADR/payment protections enhance consumer confidence in the use of payment cards for online purchases and in the global marketplace more generally.

9. Chargebacks can be a particularly effective tool when e-commerce transactions are conducted cross-border. The OECD has concluded that:

> These protections can be valuable to consumers when dealing with uncooperative businesses and play a particularly important role in distance and cross-border transactions where it may be difficult to communicate with or take legal action against the business.

Consumer Dispute Resolution and Redress in the Global Marketplace, at 6, available at, www.oecd.org/sti/consumer/36456184.pdf.

III. Payment system chargebacks not limited to credit cards

10. The Secretariat concluded (A/CN.9/WG.III/WP.124, para. 44) that "chargebacks, while a useful model, may be limited in their utility given that they apply only to payments made with a credit card." Nonetheless, in both the Colombian and United States chargeback legislation, payment card chargebacks are not limited to credit cards.

11. Colombia has a new consumer protection law that provides for chargebacks for all types of payments including credit cards, debit cards and other electronic payments. The statute sets up an automatic reversal of payment if the consumer reports to the provider and issuer within five days of notice of any claim, essentially shifting the burden to the provider or issuer. The chargeback is broadly applicable to any e-commerce transaction involving the sale of goods or performance of services. Colombia is developing an ODR mechanism to resolve the disputes arising from the application of the automatic chargebacks. The Colombian law is further described in annex A.

12. United States law provides consumers with protections for online purchases via payment card chargebacks. For example, credit card issuers must consider the claims of the consumer for unauthorized or fraudulent charges, and non-delivery or non-conforming goods. Debit card issuers must consider more limited claims, including unauthorized or fraudulent charges. As a matter of practice, most United States payment card networks provide the same chargeback rights on consumer disputes as with credit cards. The law requires credit and debit card issuers to suspend disputed charges and conduct an investigation involving both consumers and merchants. If they sustain the consumer's claim, they must reverse the disputed charge.

13. Under United States law, consumers have the option to exercise these protections, which cannot be waived. The result is non-binding, in that the consumer retains its rights to seek redress in a court. The chargeback law extends to both domestic and cross-border purchases.

14. A proposed model law on payment system chargebacks has been submitted in the OAS CIDIP VII negotiations. The draft model law would provide for chargebacks for both credit and debit card payments for goods and services that are: (a) unauthorized; (b) incorrect in amount; (c) not accepted by the consumer or not delivered in accordance with the terms of the contract. The protection would extend to cross-border purchases and mobile payments to the extent they are linked to debit or credit cards. See *Draft Model Law: Alternate Dispute Resolution for Consumer Payment Card Claims*, available at www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_B.pdf.

15. The UNCITRAL ODR colloquium also considered a proposal for a model law on chargebacks, drawing from elements of the OAS chargeback proposal, including scope. The UNCITRAL proposal, like the Colombian law, would extend to all types of payments. See http://law.pace.edu/lawschool/files/iicl/odr/MacCarthy.ppt; report of UNCITRAL ODR colloquium, A/CN.9/706, paragraph 43.

IV. A model law on payment system chargebacks would be consistent with the ODR Rules

16. The scope of the Colombian, United States and proposed OAS chargeback legislation is substantially identical to the scope of the Draft Model Rules under article 1(2) for both Track I and II, i.e., "not delivered, not timely delivered, not properly charged or credited, or not provided in conformity with the sales or service contract." As the Working Group has concluded, this scope covers the most common complaints concerning cross-border e-commerce consumer transactions. Decisions involving these disputes may be readily resolved through ODR linked to payment system chargebacks since the claims are focused and fact-based and involve a limited set of remedies.

V. Conclusion

17. In conclusion, we welcome the call for consideration of payment system chargebacks as a tool for providing effective enforcement of outcomes under the draft rules. It is a priority that Working Group III create a work product that casts a broader enough net to capture the largest number of e-commerce disputes and offers effective and immediate consumer protection in cross-border e-commerce transactions.

18. The essence of the payment system chargeback is represented in the process that this Working Group has established for Track II leading to a non-binding recommendation. It is appropriate that this Working Group consider the incorporation of a chargeback system, given its mandate to create model rules and consider private enforcement mechanisms.

Annex A

The reversal mechanism of payment in the Colombian legislation[3]

When the holder of a credit or debit card justifiably questions a transaction that has already been paid, the corresponding amount is deducted from the account of the establishment that made the transaction. This deduction is called "a *chargeback*" in English and "une *rétrofacturation*" in French. While the websites of credit card issuers do not provide a Spanish term, their Mexican, Argentine, Chilean, American, etc. equivalents unanimously regard it as a "*Contracargo*". According to Visa International, the correct term in Spain is "*retroceso*". Spanish banks prefer "*retrocesión*".[4]

- **The credit and debit card system**

Means of payment such as cash, checks, debit and credit cards or online payment mechanisms are referred to as "two-side" or "two platform" markets. What differentiates a one-side market from a two-side market is that (a) there are two distinct groups of customers; (b) they are interdependent, meaning that monies are transferred from one group to the other; and (c) an intermediary operates the transfer from one group to the other.

The costs that cardholders must assume, as a general rule, for purchasing goods and services through credit cards are: *monthly (or quarterly) fixed charges*, *handling fee and interest*. The costs associated with purchases vary depending on the issuing bank of the card. Commercial establishments charge an acquiring commission.

- **Networks and other market players**

The systems of electronic payment through cards provide an alternative to cash while decreasing transactions costs. Networks or platforms operate as open or closed systems.

Open systems are comprised of:[5] the cardholder, the merchant, the cardholder's bank, the merchant's bank and the network operator (e.g. Visa or MasterCard).[6]

In open systems, the cardholder pays a commercial establishment for goods or services using a debit or credit card. The merchant charges the card through a POS terminal which communicates the cardholder's information (e.g. PIN) and the value of the transaction to the merchant's bank.

The merchant's bank queries the network, which consults the cardholder's bank to obtain verification and authorization as to whether the cardholder has adequate funds to complete the transaction. If the cardholder has sufficient funds, the transaction is authorized and the cardholder's bank transfers funds to the account of the merchant in the merchant's bank in an amount equal to the sale price minus the value of the Interbank Exchange Rate (TII).[7] The merchant's bank pays the merchant the selling price minus the value of the Acquiring Commission. After the merchant receives confirmation of the deposit, the merchant delivers the goods or services to the cardholder.

When a cardholder makes a purchase at a business establishment using a credit or debit card, the networks are responsible, through their technology infrastructure,

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[3] The Chargeback mechanism only operates when the sale of goods is carried out through electronic commerce mechanisms, such as Internet, PSE and/or call centre and/or any other teleshopping or online store mechanism, and when a credit card, debit card or other electronic payment instrument, has been used for the payment.

[4] In: http://ec.europa.eu/translation/bulletins/puntoycoma/70/pyc701.htm.

[5] Article 1 of Decree 2230 of 2006.

[6] The cardholder's bank and the merchant's bank can be the same bank.

[7] The cardholder's bank responds to the transaction made by the cardholder within 48 hours of the operation, even if the debt is cancelled.

for sending the transaction's information to the cardholder's bank and to authorize or reject the transaction. The networks receive a commission from the system's participants.[8]

The networks or payment platforms operating in an open system are Administrator Entities of Low-Value Payment Systems, whose business is the management and operation of one or more low-value payment systems. These entities are regulated by Article 2.17.1.1.1 of Decree 2555 of 2010,[9] amended by the National Decree 3594 of 2010, Added by National Decree 4809 of 2011, Added by National Decree 0848 of 2013.

Closed systems have a very similar process to open systems, but with fewer steps since there are fewer agents participating. Closed systems are comprised of: the cardholder, the merchant, and the payment network or platform. In these systems, there are usually no cardholder banks or merchant banks acting independently, as these roles are carried out by a banking institution that enrols the cardholder and merchant in the system, issues the card and is identified as the acquirer of the transaction made with the card.

- **Chargeback mechanism**

The reversal in payment, or chargeback, involves a number of commissions and fees, which must be returned to the consumer, in addition to the price.

Document A/CN.9/WG.III/WP.124 of Working Group III — UNCITRAL, includes a discussion of a mechanism on *reversal of payment* or "*chargeback*", "*reimbursement*" or "*return*" by which the participants in a process of payment through electronic means, shall reimburse the sums of money cancelled or debited to the consumer, when certain events occur and the request is made within a period of time laid down in law. This mechanism will be reviewed by the delegations.

This mechanism is intended for cross-border e-commerce transactions involving a credit card, debit card or other electronic payment method.

In 2011, the Colombian Congress issued Law 1480, "*Whereby the Consumer Statute is issued and dictate other provisions*". Under article 51 of this law a chargeback mechanism is established that allows the return of payments when:

1. Sales of goods are offered through electronic commerce, such as Internet, PSE[10] call centres or any other mechanism for teleshopping via an online store, and
2. Payment has been made by a credit card, debit card or any other electronic payment method.

Under this provision, the participants of the payment process are required to reverse the payments at the request of the consumer when:

1. The transaction is fraudulent or was unsolicited
2. The product was not received
3. The delivered product does not correspond to the product ordered or is defective.

[8] Article 2.17.1.1.1 of Decree 2555 of 2010.

[9] Decree 2555 of 2010 "*Whereby are collected and re-issued rules on the financial, insurance and stock market sector and dictate other provisions*."

[10] "Pagos Seguros en Línea-PSE". This mechanism allows companies to offer their customers the possibility of making payments and/or purchases, debiting the amount online from the Financial Entity where the client has their money and depositing it in the acquiring Financial Entity that determines the company or commerce.

Under Colombian law, a chargeback request is effective if the consumer[11] informs the issuer of the electronic payment used and the merchant within five (5) business days from the date of (1) the receipt of any report of fraudulent or unsolicited merchandise, (2) the date the product should have been received in the event of non-delivery or (3) when the product was received in the event the product was defective or did not correspond to the product ordered. Upon receipt of a complaint, the issuer of the electronic payment instrument used, together with the other **participants in the payment process**,[12] shall reverse the transaction to the purchaser.

The regulations implementing the Colombian law also stipulate the period within which the complaint or demand must be filed before the competent judicial or administrative authority.

This reversion must be implemented without prejudice to the duty of the provider to meet its legal and contractual obligations to the consumer. Administrative sanctions may apply, if the judicial or administrative authority determines that there was bad faith on the part of the consumer, in which case the Superintendence may impose penalties of up to fifty (50) minimum monthly legal wages.

Under Article 51 of Law 1480 of 2011, paragraph 2, the consumer is entitled to reverse the payments for any service or obligation of periodic compliance, for any reason and even without there being any justification, provided that the payment is made through an automatic debit operation previously authorized by that consumer, in the terms established by the National Government.

The reversal in payment — or as it is known in Colombia, "refund" or "chargeback" — involves all actors linked in the payment process through electronic means, in both open and closed systems: **the issuing bank**, **the acquiring bank**, **the merchant**, **the cardholder and the network or system administrator of low-value payments**, who are subject to obligations and rights.

Such a mechanism provides the consumer with a solution to their dispute in a quick and efficient manner, without renouncing the recourse to traditional judicial justice.

This non-binding chargeback mechanism can be linked to the procedure provided by ODR, leaving the consumer with the possibility of using the two Tracks laid down in the draft rules, or traditional judicial justice.

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[11] N. 3 article 5, Law 1480 of 2011 "*Consumer or user. Any natural or legal person that, as an end user, purchases, possesses or uses a particular product, whatever its nature, to satisfy a personal, private, family or home and business need when it is not intrinsically linked to his economic activity. Consumer will be understood to be included in the definition of the term user*."

[12] "**Paragraph 1**. For the purposes of this article, are understood by participants in the payment process, the issuers of the payment instruments, the administering entities of the Low-Value Payment Systems, banks that manage the accounts and/or consumer bank deposits and/or supplier, among others."

IV. ELECTRONIC COMMERCE

A. Report of Working Group IV (Electronic Commerce) on the work of its fiftieth session (Vienna, 10-14 November 2014)

(A/CN.9/828)

[Original: English]

Contents

I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[1]

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.[2]

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions during the colloquium on electronic commerce (New York, 14-16 February 2011).[3] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[4] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules").[5] In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[6]

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group

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[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

[3] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

[4] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[5] Ibid., para. 235.

[6] Ibid.

(A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.[7] There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate cross-border use of electronic transferable records was emphasized.[8] In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.[9] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.[10]

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field. It was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision to be made by the Working Group on the final form (A/CN.9/761, paras. 90-93).

7. At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14). As to future work, it was noted that while the draft provisions were largely compatible with different outcomes that could be achieved, caution should be exercised to prepare a text that had practical relevance and supported existing business practices, rather than regulated potential future ones (A/CN.9/768, para. 112).

8. At its forty-sixth session, in 2013, the Commission noted that the work of the Working Group would greatly assist in facilitating electronic commerce in international trade.[11] After discussion, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[12] It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.[13]

9. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) (A/CN.9/797, paras. 109-112).

10. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and its addendum. The Working Group focused on the discussion on the concepts of original, uniqueness, and integrity of an electronic

[7] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 82.
[8] Ibid., para. 83.
[9] Ibid.
[10] Ibid., para. 90.
[11] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 227.
[12] Ibid., paras. 230 and 313.
[13] Ibid., para. 313.

transferable record based on principles of functional equivalence and technological neutrality.

11. At its forty-seventh session, in 2014, the Commission took note of the Working Group's key discussions at its forty-eighth and forty-ninth sessions.[14] Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records.[15]

II. Organization of the session

12. The Working Group, composed of all States members of the Commission, held its fiftieth session in Vienna from 10 to 14 November 2014. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, China, Colombia, Denmark, France, Germany, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

13. The session was also attended by observers from the following States: Angola, Belgium, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Egypt, Iraq, Libya, Malta, Nicaragua, Peru, Sweden and Tunisia.

14. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organizations*: International Centre for Promotion of Enterprises (ICPE) and World Customs Organization (WCO);

(b) *International non-governmental organizations*: African Center for Cyberlaw and Cybercrime Prevention (ACCP), Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Association of the Bar of the City of New York (ABCNY), China Society of Private International Law (CSPIL), CISG Advisory Council, Institute of Law and Technology (Masaryk University), International Federation of Customs Brokers Associations (IFCBA), International Federation of Freight Forwarders Associations (FIATA), Internet Corporation for Assigned Names and Numbers (ICANN) and Law Association for Asia and the Pacific (LAWASIA).

16. The Working Group elected the following officers:

Chairman: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Ligia GONZÁLEZ LOZANO (Mexico)

17. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.129); and (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.130 and 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. Consideration of the draft provisions on electronic transferable records.
5. Technical assistance and coordination.

[14] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17).
[15] Ibid.

6. Other business.

7. Adoption of the report.

III. Deliberations and decisions

19. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.130 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft provisions on electronic transferable records

20. The Working Group recalled that, at its forty-sixth session, broad support had been expressed for the preparation of draft provisions on electronic transferable records. At that session, the Working Group had agreed that those provisions should be presented in the form of a model law, without prejudice to the decision on the form of its work (A/CN.9/761, para. 93). In light of the progress made during the previous three sessions, views were exchanged on the form of the text to be prepared.

21. One view was that the draft provisions should take the form of a model law. It was explained that, given the limited number of existing legislation on electronic transferable records, a model law would provide useful guidance to States as well as flexibility in addressing differences in national laws. It was indicated that a model law would be easier to update in light of legislative and practical developments. It was further stated that the preparation of a model law would not necessarily preclude the possibility of preparing, at a later stage, an instrument of a treaty nature, which would offer a higher degree of legal uniformity. It was added that those concerns expressed with regard to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") could be adequately addressed in a model law.

22. Yet, another view was that it was premature to proceed with the preparation of a model law, particularly due to the conflicts it might create with respect to the Geneva Conventions. Thus, support was expressed for a text of a less binding nature, such as a legislative guide.

23. After discussion, it was agreed that the Working Group would proceed with the preparation of a draft model law on electronic transferable records ("draft Model Law"), subject to a final decision to be made by the Commission.

24. The Working Group then considered the treatment of electronic transferable records that existed only in an electronic environment and had no corresponding paper-based transferable document or instrument. It was suggested that including such records in the scope of the draft Model Law might require adjustments to the overall structure as well as to the wording of the draft Model Law.

25. It was recalled that the Working Group had previously attempted to deal with the issue. For example, the definition of electronic transferable records in draft article 3 had been broadened to include those records that existed only in an electronic environment. Paragraph 3 of draft article 1 aimed at extending the application of the draft provisions to those records in jurisdictions where such records existed.

26. It was suggested that the draft Model Law should not exclude from its scope those records that existed only in an electronic environment, which performed the same functions as or similar functions to a paper-based transferable document or instrument. In that context, it was widely felt that the draft Model Law, by taking a functional approach, could provide needed guidance.

27. However, it was also felt that the Working Group should be cautious in taking such an approach as the key aim of the draft Model Law should be to provide functional equivalence rules enabling the use of paper-based transferable documents or instruments in an electronic environment. It was further mentioned that the Working Group should not be excessively concerned by those records that existed only in an electronic environment, which were present in very few jurisdictions, as the national laws that created such records were already self-sufficient. The concern was also expressed that the inclusion of those records in the scope of the draft Model Law would entail matters of substantive law.

28. After discussion, the Working Group agreed to proceed with the preparation of functional equivalence rules for the use of electronic transferable records corresponding to a paper-based transferable document or instrument. However, as it was generally felt that there was merit in extending the scope of the draft Model Law to those records that existed only in an electronic environment, it was agreed that the Working Group, at a later stage, should review the draft articles to see if and how they could be adjusted in relation to such records.

29. With respect to the scope of application of the draft Model Law, it was explained that, while the main focus of the Model Law was to provide functional equivalence rules for enabling the use of electronic equivalents of paper-based transferable documents or instruments, it would be desirable to provide guidance also with respect to transferable records that existed only in an electronic environment, which already existed in certain jurisdictions. It was clarified that this seemed in line with the broad mandate received from the Commission (A/66/17, para. 238). It was suggested that a structured approach, allowing first for the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and, at a later stage, for the review of those provisions in light of the needs of transferable records that existed only in an electronic environment, would facilitate completion of the project.

30. The Working Group agreed that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It also agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should subsequently be reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment.

Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]

31. As to the first set of square brackets in the chapeau of paragraph 1, it was agreed that it would be sufficient to refer to “an” electronic transferable record. It was further agreed that the definition of the term “electronic record” should be retained.

32. With respect to the first part of subparagraph 1(a), it was indicated that an electronic transferable record as defined in draft article 3 produced necessarily legal effects, including entitling its holder to performance, and that therefore the word “[operative]” was not necessary (see also A/CN.9/804, para. 72). It was added that the word “[operative]” could be subject to different interpretations and be misunderstood as having substantive implications. It was suggested that the words “to identify the electronic record as the electronic transferable record” should replace the words “to identify that electronic record as the [operative] electronic record to be used as an electronic transferable record”.

33. In response, it was said that the qualification “operative” or “authoritative” was necessary to identify the electronic record equivalent to a paper-based transferable document or instrument entitling its holder to performance. It was explained that the identification of the operative or authoritative electronic record was necessary to clarify which electronic record was the transferable record. It was added that, although an electronic transferable record as defined in draft article 3 produced legal

effects, that did not suffice to identify which electronic record was the operative or authoritative record. In that line, it was suggested that the words "to identify that electronic record as the electronic record containing the authoritative information constituting the electronic transferable record" should replace the words "to identify that electronic record as the [operative] electronic record to be used as an electronic transferable record".

34. It was recalled that the second part of subparagraph 1(a) originated from previous discussion on uniqueness (see also A/CN.9/804, paras. 71 and 74). It was explained that the reference to prevention of unauthorized replication of electronic transferable records was included with the aim of avoiding the circulation of more than one electronic transferable record, which could lead to multiple claims for performance of the same obligation.

35. After discussion, the Working Group decided to retain the two drafting suggestions relating to the first part of subparagraph (1)(a) in square brackets for future consideration and to delete the words "to identify that electronic record as the [operative] electronic record to be used as an electronic transferable record".

36. With respect to paragraph 2, the Working Group discussed whether a reliability standard should be included for each subparagraph of paragraph 1.

37. One view was that there was no need to include a reliability standard for subparagraphs (a) and (b), as other provisions, such as draft articles 12 and 18, already provided such guidance.

38. Another view was that subparagraph (b) required a different treatment as the reliability test need not apply when assessing whether the method rendered the electronic record capable of being subject to control. It was recalled that draft article 18 provided the standard for assessing the reliability of the method used to establish control. Hence, it was suggested that the reliability test should only apply to subparagraphs (a) and (c).

39. With respect to subparagraph (c), it was agreed that guidance should be sought from draft article 11(2) (see para. 49 below).

40. After discussion, the Working Group agreed that paragraph 2 should be deleted and paragraph 1 could be revised along the following lines:

> "1. Where the law requires the use of a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by the use of an electronic record if a method is employed:
>
> (a) That is as reliable as appropriate, [to identify that electronic record as the electronic transferable record] [to identify that electronic record as the electronic record containing the authoritative information constituting the electronic transferable record] and to prevent the unauthorized replication of that electronic transferable record;
>
> (b) To render that electronic record capable of being subject to control during its life cycle; and
>
> (c) That is as reliable as appropriate, to retain the integrity of the electronic transferable record."

Draft article 11. Integrity of an electronic transferable record

41. It was agreed that the contents of draft article 10(1)(c) and of draft article 11(1) were identical and that draft article 11(1) should be deleted.

42. With respect to paragraph 2 of draft article 11, it was explained that the provision should aim at ensuring that changes to the electronic transferable record that had possible legal consequences would need to be documented in order to satisfy the requirement of integrity in draft article 10(1)(c), but this would not include changes of a technical nature. It was added that using language already present in

other UNCITRAL texts, and whose meaning was therefore clear, would be preferable to introducing new language.

43. The view was expressed that the term "legally relevant" was unclear and should be deleted. It was explained that the term "authorized" aimed at ensuring that permitted changes would be recorded. It was further explained that paragraph 2 aimed at establishing a standard for assessing the functional equivalent of integrity, and from that perspective, non-permitted changes should not be documented. However, it was added, in practice the system might document non-permitted changes for other purposes, such as documenting misuse or abuse of an electronic transferable record.

44. Another view expressed was that the term "authorized" could present challenges in determining which changes were authorized. For that reason, it was suggested that the term "legally relevant" should be retained.

45. After discussion, the Working Group agreed that paragraph 2 should be merged with draft article 10 to provide the criteria for assessing integrity and a reliability standard for integrity. It was further agreed that the words "legally relevant" and "authorized" should be retained in square brackets, the words "apart from any change which arises in the normal course of communication, storage and display" should be retained outside square brackets, and the words "[, and in accordance with draft article 30]" should be deleted.

46. The Working Group then considered subparagraph 2(b). Differing views were expressed. One view was that there was no need for the reliability standard to make reference to the purpose for which the information in the electronic transferable record was generated as that purpose was not likely to vary with each type of electronic transferable record.

47. Another view was that the provision contained in subparagraph 2(b) could have an implication broader than the integrity of the electronic transferable record. It was noted that similar reliability standards were found in draft articles 9 and 18. It was suggested that subparagraph 2(b) could be placed in draft article 12. It was explained that the application of the general reliability standard contained in draft article 12 in the various draft articles would differ depending on the purpose of each article and that this would give needed flexibility when assessing the application of the reliability standard in practice. The same would apply if subparagraph 2(b) were to be incorporated in draft article 12.

48. There was support for that view. However, it was pointed out that draft article 12 aimed at setting out a reliability standard for the electronic transferable record management system as a whole, whereas subparagraph 2(b) was specific to the integrity of the record and the information contained therein. It was therefore suggested that subparagraph 2(b) should be retained with respect to the integrity of the electronic transferable record.

49. After discussion, it was agreed that subparagraph 2(b) should be retained as part of draft article 10 (see para. 45 above) and also included, with general application, in draft article 12 for further consideration by the Working Group.

Draft article 18. Possession

50. It was agreed that the words "the use of" in the chapeau of paragraph 1 should be deleted.

51. With respect to subparagraph 1(a), concerns were raised on the use of the word "identify". In particular, it was said that identification could be understood as implying an obligation to name the person in control. In response, it was indicated that the draft Model Law allowed for the issuance of electronic transferable records to bearer, which implied anonymity. After discussion, it was agreed that the words "[and to identify the person in control]" should be deleted as the notion of control implied the identification of the person in control.

52. With respect to subparagraph 1(b)(i), it was said that the term "generated" should be retained because it referred to a technical process and did not have any substantive law implication. It was added that the same term had been used in other UNCITRAL texts on electronic commerce, such as in article 8(1)(a) of the UNCITRAL Model Law on Electronic Commerce, as well as in the draft Model Law. In that respect, it was also recalled that the term "created" had been used in the Rotterdam Rules.

53. It was suggested that the term "issued" could replace both "generated" and "created" since it was widely used in business practice and had an established meaning. Concerns were raised that the term "issued" had certain substantive law implications. Different views were expressed on whether its use would pose challenges given the correlation between control as a functional equivalent of possession and issuance.

54. After discussion, the Working Group agreed to retain the terms "[generated]" and "[issued]" in subparagraph 1(b)(i) for future consideration.

55. It was indicated that paragraph 2 was redundant in light of draft article 10(1)(b). It was explained that since that provision set forth a requirement with respect to electronic transferable records, it would be better placed in draft article 10. The Working Group agreed to delete paragraph 2.

56. In that context, it was suggested that the reference to "life cycle" in draft article 10(1)(b) could be replaced with language similar in content but more descriptive, such as that used in article 1(21) of the Rotterdam Rules.

Draft article 19. [Presumption of person in control]

57. It was noted that draft article 19 originated from a provision establishing the requirements of control. It was explained that other aspects of that provision had been incorporated in the definition of "control" in draft article 3 as well as in draft article 18. It was stated that, while the aim of current draft article 19 was to provide a "safe harbour" rule for the reliability of a method establishing control (A/CN.9/WG.IV/WP.128/Add.1, para. 14), a discussion to clarify its actual scope was required.

58. It was said that the current formulation of the draft article as a presumption rule added an unnecessary element of complexity. It was further explained that presumption rules might be useful in substantive law, but not in a text aimed at achieving functional equivalence. Hence, it was indicated that the draft article should be drafted as an assertive rule. It was also suggested that the draft definition of "control" could be incorporated in the draft article.

59. It was said that subparagraph (a) should take into consideration instances when the person in control was identified other than by the electronic transferable record. In that respect, it was said that subparagraph (a) should refer to the method used for identification instead.

60. A suggestion was made that draft article 19 could be revised along the following lines to set out the requirements of control: "For the purposes of this law, a person has control of an electronic transferable record when the method employed reliably identifies such person as the person entitled to the rights evidenced by the electronic transferable record."

61. It was explained that draft article 19 as revised would make it possible for "control" to achieve the same result that "possession" of a paper-based transferable document or instrument brought, without touching upon substantive law. It was stated that the method to be employed to establish control would identify the person with the rights, while the substantive law would decide whether or not that person was the rightful holder. It was also noted that the current definition of control, which merely stated that control was a factual power to deal with or dispose of the electronic transferable record, did not provide sufficient guidance.

62. While support was expressed for that proposal as it aimed at describing in an assertive manner how control was to be established, concerns were also raised. It was said that the revised article did not fully set out the requirements of control. It was also pointed out that referring to the "person entitled to the rights evidenced by the electronic transferable record" was inappropriate as that referred only to the rightful holder under substantive law. It was further suggested that the definition of "control" provided in draft article 3 could be incorporated into draft article 19.

63. It was generally felt that the key element to be incorporated in the draft article was that the method establishing control identified a person in control (or, possibly, more than one person), without implying whether that person would have the right to performance of the obligation. It was further noted that the draft article would not need to touch upon the legal consequences of a person being in control of the electronic transferable record. It was also stated that an electronic transferable record in itself did not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performed that function. It was added that a reliable identification of the person in control was needed to build confidence of third parties in the use of electronic transferable records.

64. After discussion, the Working Group agreed that draft article 19 should be revised as follows:

> "A person has control of an electronic transferable record if the method reliably identifies that person as the person in control."

65. It was also agreed that draft article 19 would be better placed as a separate paragraph in draft article 18, thereby supplementing the functional equivalence rule contained therein.

66. The view was expressed that the resulting provision would render the definition of "control" in the draft Model Law unnecessary. This was objected to as the current definition of "control" provided some guidance to the readers of the draft Model Law. It was added that decisions on definitions could be better taken once the draft articles of the Model Law had been fully considered and the use of the defined terms ascertained.

67. After discussion, it was agreed that the definition of "control" would be retained in the draft Model Law in square brackets.

Draft article 20. Delivery

68. With respect to draft article 20, it was agreed that the words "[of control]" could be deleted in light of the definition of the term "transfer" in draft article 3.

Draft article 21. Presentation

69. The view was expressed that there was no need to retain draft article 21 as there was no clear distinction between delivery and presentation. It was added that a dedicated provision on presentation would not be necessary, since draft articles on endorsement and control would suffice to establish the functional equivalence of presentation. Another view was that presentation performed a function different from delivery and thus, it was necessary to have a functional equivalence rule for presentation.

70. Support was expressed for retaining the words "or provides consequences for non-presentation" outside square brackets to cover all possible circumstances.

71. It was indicated that reference to the intention to present the electronic transferable record was not needed in the draft article since the draft Model Law should not refer to the will of the parties, which was relevant for substantive law. It was also pointed out that the intention to present was implicit in the act of presentation itself. In response, it was noted that, if the reference to the intention to present were to be deleted, the resulting text would refer only to demonstration of control of the electronic transferable record, which was not a matter exclusive to presentation, but common to the entire life cycle of the electronic transferable record.

72. During the discussion of draft article 21, a suggestion was made that the words "the use of" should be deleted in line with the decision made with respect to draft article 18 (see above, para. 50). It was agreed that the words "the use of" should be deleted. Furthermore, the Secretariat was requested to review those draft articles (for example, articles 8, 9, 10, 13, 15, 20 and 22) where the words "with respect to the use of an electronic transferable record" were used and to revise them accordingly.

73. After discussion, the Working Group agreed to adopt the following text as the basis for its deliberations:

> "Where the law requires a person to present for performance or acceptance a paper-based transferable document or instrument or provides consequences for non-presentation, that requirement is met with respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsements if required, for performance or acceptance."

74. A concern was expressed that the revised draft article 21 might have unintended substantive law implications.

75. A number of suggestions were made with respect to the sequence and placement of draft articles 20, 21, 22 and 23.

Draft article 22. Endorsement

76. It was recalled that endorsement was one of the two elements for transferring paper-based transferable documents or instruments, the other being delivery. It was suggested that a provision on endorsement would not be necessary, given that the draft Model Law already contained functional equivalence rules for writing, signature and transfer. However, in response, it was said that the draft article was necessary to provide functional equivalence for forms of endorsement required under substantive law, such as endorsements on the back of a paper-based transferable document or instrument or by affixing an allonge, and should therefore be retained.

77. It was indicated that there were instances when substantive law allowed for, but did not require endorsement, and that therefore the words "or permits" should be retained.

78. It was said that the words "logically associated or otherwise linked to" better reflected current practice and were technology-neutral. However, the view that the words "included in" would more accurately reflect current practice was also expressed. It was added that reference to "logically associated or otherwise linked to" was already present in the definition of electronic record and that the retention of the words "included in" would also cover cases where information relating to the endorsement was logically associated or otherwise linked to the electronic record, thereby forming a composite electronic record.

79. It was suggested that the definition of "transfer" of an electronic transferable record, which set forth that the transfer of an electronic transferable record meant the transfer of control over an electronic transferable record, and draft article 22, which established a functional equivalence rule for the endorsement of an electronic transferable record, should be more closely aligned.

80. After discussion, the Working Group agreed to retain the draft article as well as the words "or permits" outside square brackets. It was also agreed that the words "that requirement is met" should be revised to take into account instances where the law permitted an endorsement and that similar drafting changes should be made to other articles in the draft Model Law. It further agreed to retain the words "logically associated or otherwise linked to" as well as "included in" to provide for all possible instances and methods for the incorporation of an endorsement in an electronic transferable record.

Draft article 23. Transfer of an electronic transferable record

81. A suggestion was made that draft article 23 should be transformed into a functional equivalence rule along the following lines:

> "Where the law requires or permits the issuance or transfer of a paper-based transferable document or instrument to bearer, that is met with respect to an electronic transferable record if the electronic transferable record is issued or transferred in a manner that the identity of the person in control of the electronic transferable record is not known.
>
> "Where the law requires or permits a paper-based transferable document or instrument that is issued to bearer to be transferred to a named person, that is met with respect to an electronic transferable record if the electronic transferable record, which was issued to a person in control whose identity is unknown, is transferred to a person in control whose identity is known."

82. On the other hand, it was suggested that draft article 23 should be deleted because it would be sufficient for the draft Model Law to allow for the issuance and transfer of electronic transferable records to bearer in the same manner as paper-based transferable documents or instruments, a result which was already achieved in draft article 1, paragraph 2. It was said that if the draft article were to be revised as a functional equivalence rule (see para. 81 above), it could have an unintended effect of imposing additional requirements when an electronic transferable record was issued or transferred to bearer. In that context, the practical reasons for issuing or transferring paper-based transferable documents or instruments to bearer were stressed (for example, parties in the chain of transfers might not wish to endorse the document or instrument so as not to attract liability).

83. In response, it was stated that the electronic environment posed peculiar challenges since there could be uncertainty as to what constituted an electronic transferable record issued or transferred to bearer. It was explained that a user of the electronic transferable record system would, in most cases, have to identify itself to access the system. In that case, while the electronic transferable record itself might not expressly indicate the name of the person in control, the system would nonetheless contain such information. If such information was made available to the person in control at the end of the chain of transfers, and in particular if such information, once associated with the electronic transferable record, was made available to the transferee, the question arose whether that electronic transferable record could be considered the functional equivalent of a paper-based transferable document or instrument to bearer. It was further indicated that a functional equivalence rule on this matter was needed because draft article 1, paragraph 2, referred the matter to substantive law without providing additional guidance.

84. While some support was expressed for retaining the draft article as revised (see para. 81 above), the Working Group agreed to delete draft article 23.

Draft article 24. Amendment of an electronic transferable record

85. With respect to draft article 24, it was widely felt that the key element to be incorporated was the possibility to evidence and trace any amended information contained in an electronic transferable record.

86. As to its structure, there was agreement that draft article 24 should be aligned with other draft articles providing a functional equivalence rule (for example, articles 20 to 22) along the following lines:

> "Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], that requirement is met with respect to an electronic transferable record, if a method is employed to reflect all the amended information and to identify the amended information as such."

87. A view was expressed that draft article 24 could be deleted considering that an amendment generally consisted of a writing and a signature, for which

draft articles 8 and 9 already provided functional equivalence rules. Hence, if retained as a functional equivalence rule (see para. 86 above), draft article 24 would need to merely refer to draft articles 8 and 9 and state that such an amendment would need to be identifiable as such.

88. Drafting suggestions were also made. While it was argued that the inclusion of the word "all" emphasized the need to reflect every amended information, it was generally felt that that notion was evident in paragraph 1 even without the word "all". It was also widely felt that the term "accurately" could be deleted as it did not provide an objective standard while introducing an additional burden. A similar argument was made with respect to the word "readily". In response, it was stated that without such qualification the burden of identifying amended information would fall on the users of the system, since in an electronic environment all amended information would be identifiable, albeit not easily for the users. Therefore, it was indicated that the adoption of a stringent standard would be desirable so that users would be able to easily and readily distinguish amended information.

89. With respect to paragraph 2, it was suggested that as long as paragraph 1 included a requirement that any amended information would be identifiable as such, a statement to that effect would not be necessary in the electronic transferable record. It was also stated that the method to be employed to identify the amendment or the amended information need not be set out in the draft Model Law as it could impose additional burden on the management of the electronic transferable record. There was general support for that suggestion.

90. After discussion, it was agreed that draft article 24 should be recast as a functional equivalence rule similar to other draft articles taking into account the suggestions made above. It was also agreed that the square brackets around the words "or permits" and "or provides consequences for the absence of an amendment" should be removed. It was further agreed that the words "[all]" and "[accurately]" as well as paragraph 2 should be deleted.

Draft article 25. Reissuance

91. The view was expressed that paragraph 1 could be deleted as it was simply a restatement of draft article 1, paragraph 2, stating that if reissuance were permitted under substantive law, it should also be allowed for electronic transferable records. However, it was noted that there was some merit in retaining the paragraph to confirm that understanding.

92. It was also suggested that paragraph 2 could be deleted as it introduced an additional requirement that might not exist under substantive law. That view was supported by practice in the transport industry, whereby a reissued bill of lading would bear no indication of such reissuance.

93. After discussion, it was agreed that paragraph 1 should be retained, while paragraph 2 should be deleted.

Draft article 26. Replacement

94. It was suggested that the heading of the draft article should be changed to "Change of medium" to reflect the actual content of the provision.

95. It was recalled that the draft article had a substantive nature due to the fact that the law applicable to paper-based transferable documents or instruments was unlikely to provide rules for change in medium. It was added that the draft article should satisfy two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced document or record would not further circulate.

96. It was suggested that the word "holder" should substitute the words "person in control" in the chapeau of paragraph 1 and in subparagraphs 1(a) and (b), as those provisions referred to the holder in possession of a paper-based transferable document or instrument. The suggestion was also made that the words "change the medium by

replacing" should substitute the word "replace" in the chapeau of paragraph 1 for clarification.

97. It was further suggested that the word "surrender" should be retained in the draft article because the word "present" had a specific meaning under draft article 21. It was suggested that the words "replacement for" should be deleted as they were superfluous. It was also said that the word "upon" was preferable to the word "after" to express the notion that there should be no interval between the issuance of the replacement and the termination of the replaced document or record.

98. Different views were expressed on the sequence of the various steps needed for change of medium. In particular, it was noted that, if the replaced document or record were to cease to have any effect or validity before the issuance of its replacement, this could expose the holder or the person in control to having no document or record in case the issuance of the replacement was not completed. On the other hand, if the replaced document or record were to cease to have any effect or validity after the issuance of its replacement, the obligor could be exposed to multiple claims based on both an electronic transferable record and a paper-based transferable document or instrument in case the replaced document or record had not been terminated. In response, it was noted that the requirements set forth in subparagraphs (a), (b) and (c) of paragraphs 1 and 2 were concurrent and not sequential, and that the parties would be in a position to determine the most adequate sequence for meeting those requirements in light of all circumstances.

99. With respect to the consent requirement, it was suggested that reference should be made to the obligor as the holder would have the right to compel performance by the obligor. In response, it was said that an obligor would be able to issue the replacement instrument only when it was also the issuer, for example, in bills of lading and promissory notes, but that the issuer and the obligor were different parties in bills of exchange. It was added that reference to the obligor as the person entitled to express consent to the change of medium would be too broad since, under its current definition, "obligor" would include endorsers and that would lead to requiring consent of a number of parties not directly affected by the change of medium, with significant increase in cost and time. In that respect, it was suggested that the matter could be further considered in conjunction with the definition of "obligor", which was used only in draft articles 26 and 27 of the draft Model Law.

100. It was illustrated that some existing legislation and practice recognized only change of medium from electronic to paper, and that in those cases the request of the holder could suffice to change medium, while the obligor would have to comply.

101. It was indicated that paragraph 3 repeated a concept already contained in the draft Model Law and that it should be deleted. Similarly, it was indicated that paragraph 4 restated a notion already present in the draft Model Law as well as a general legal principle, and that therefore it should be deleted. In response, it was said that paragraph 4 performed useful declaratory functions.

102. After discussion, the Working Group agreed that: the title of the draft article should be revised to "Change of medium"; the word "holder" should replace the words "person in control" in the chapeau of paragraph 1 and in subparagraphs 1(a) and (b); the word "[issuer]" should be deleted and the word "obligor" should be kept outside square brackets for future consideration; the words "[present]" and "[for replacement]" should be deleted while the word "surrender" should be retained outside square brackets; and the word "upon" should be kept outside square brackets and the word "[after]" deleted. It was further agreed that paragraphs 1 and 2 should be recast in order to reflect that the requirements contained therein were concurrent and not sequential, and that paragraphs 5 and 6 should be revised taking into account the suggestions mentioned above. The Working Group also agreed to delete paragraph 3 and to retain paragraph 4.

Draft article 27. Division and consolidation of an electronic transferable record

103. It was noted that the draft article should aim at providing a functional equivalence rule and should be recast accordingly. It was indicated that different levels of details were possible, and that, while a more generic rule could promote technology neutrality, a more detailed rule could provide additional useful guidance. In that respect, it was said that reference to a reliable method as the sole requirement for functional equivalence could be sufficient. However, it was also suggested that elements in paragraphs 2 and 3 could be considered as requirements of such a functional equivalence rule.

104. After discussion, the Working Group agreed that paragraph 1 should be aligned with other functional equivalence rules. It was also agreed that paragraphs 2 and 3 should be deleted, while certain elements of paragraphs 2 and 3 could become part of paragraph 1.

Draft article 28. Termination of an electronic transferable record

105. With respect to the draft article, the view was expressed that the current wording emphasized too much the end-result of "preventing circulation" and that the reference to the word "circulation" was not clear. It was also suggested that the draft article should be recast following the structure of other functional equivalence rules.

106. As to the content of the rule, a number of options were suggested: (i) to retain the current wording "preventing further circulation of an electronic transferable record"; (ii) to refer to "termination of the electronic transferable record"; (iii) to refer to "depriving the electronic transferable record of its effects as such"; and (iv) to refer to "preventing further transfer of the electronic transferable record".

107. It was recalled that the aim of the draft article was to provide guidance on how termination could be achieved in an electronic environment. In that context, it was suggested that simply referring to "termination" of the electronic transferable record might not provide sufficient guidance. The need to consider the use of the word "termination" throughout the draft Model Law was stressed.

108. After discussion, it was agreed that paragraph 1 should be revised along the following lines: "Where the law requires or permits the termination of a paper-based transferable document or instrument or provides consequences for its non-termination, that is met with respect to an electronic transferable record if a reliable method is used [to terminate the electronic transferable record][to prevent further transfer/circulation of the electronic transferable record]." It was further agreed that paragraph 2 should be deleted.

Draft article 29. Use of an electronic transferable record for security rights purposes

109. With respect to the draft article, it was agreed that paragraph 1 should be recast in the format similar to other functional equivalence rules. In that context, it was noted that the variance in the substantive laws governing paper-based transferable documents or instruments, particularly with respect to their use for security right purposes, made it difficult to formulate a rule more concrete than as provided in the draft article, which was only permissive in nature.

110. After discussion, it was agreed that paragraph 1 should be recast as a functional equivalence rule possibly providing guidance on the elements to be considered to enable the use of electronic transferable records as collateral in secured transactions.

111. It was further agreed that a new paragraph could be included either in the draft article or elsewhere in the draft Model Law stating that the draft Model Law would not affect the application of any rule of law governing security rights in paper-based transferable documents or instruments or electronic transferable records.

V. Technical assistance and coordination

112. The Working Group heard an oral report on the technical assistance and coordination activities undertaken by the Secretariat in the field of electronic commerce. Particular reference was made to recent or upcoming events in Sri Lanka, Colombia, China and Australia to promote UNCITRAL texts on electronic commerce, as those States were already signatories of the United Nations Convention on the Use of Electronic Communications in International Contracts (the Electronic Communications Convention) or had already made significant steps to become a party to that Convention.

113. The Working Group was informed of the status of the Electronic Communications Convention, which now had six States parties, with Montenegro being the most recent to ratify the Convention in September 2014. It was further noted that an increasing number of States had enacted national legislation that included substantive provisions of the Electronic Communications Convention. In that context, the interaction between the Convention and other UNCITRAL texts, in particular the United Nations Convention on Contracts for the International Sale of Goods and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was highlighted.

114. It was further mentioned that the Secretariat continued to be engaged in providing law reform assistance to States in preparing, updating and reviewing their electronic commerce legislation, and that the UNCITRAL website was constantly updated with information about States that have enacted legislation based on UNCITRAL texts.

115. The Working Group also took note of ongoing coordination activities, among others with United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP), United Nations Conference on Trade and Development (UNCTAD) and Asia-Pacific Economic Commission (APEC).

116. The Working Group also heard a presentation by a representative of the European Commission on the Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS Regulation), which was adopted on 23 July 2014 and entered into force on 17 September 2014 providing a predictable regulatory environment to enable secure and seamless electronic interactions. Other developments in the European Union with respect to identification and trust services and their possible implications for the private sector as well as globally were mentioned. It was said that certain aspects of the eIDAS Regulation could shed light on the present and future work of the Working Group.

117. The Working Group also heard a presentation on an ongoing research project on the use of electronic transferable records for supply chain financing carried out at the University of Goteborg. It was mentioned that preliminary findings highlighted the need to fully understand the developments in the functions of negotiable transport documents, and how they could interact with, and possibly further modernize secured transactions law and practice. It was indicated that the outcome of that research project could be particularly useful to promote access to credit for small and medium-sized enterprises. In that respect, it was added that the traditional use of negotiable transport documents presupposed a time frame not adequate for modern logistics practice and that their dematerialization could have a major impact in expanding their use.

B. Note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.130 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[1]

2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the final form of its work (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as contained in document A/CN.9/WG.IV/WP.124 and Add.1.

5. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. The Working Group focused its discussion on concepts of original, uniqueness, and integrity of an electronic transferable record. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/804, paras. 17-86).

II. Draft provisions on electronic transferable records

A. General

"Draft article 1. Scope of application

"1. This law applies to electronic transferable records.

"2. Other than as provided for in this law, nothing in this law affects the application to an electronic transferable record of any rule of law governing a paper-based transferable document or instrument.

"[3. This law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]"

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

Remarks

6. Draft article 1 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17). Draft article 1, paragraph 2, would, for instance, facilitate the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/797, para. 65).

7. Draft article 1, paragraph 3, would only be applicable in States that have enacted legislation on electronic transferable records that exist only in an electronic environment. In such case, paragraph 3 aims at allowing the application of the draft provisions also to those electronic transferable records, without interfering with their substantive law. Hence, this paragraph would not be necessary in jurisdictions where no such electronic transferable record exists. The Working Group agreed that a decision on paragraph 3 could only be made in light of the final form of the draft provisions, which has not yet been determined (A/CN.9/797, para. 17).

"Draft article 2. Exclusions

"1. This law does not override any rule of law applicable to consumer protection.

"2. This law does not apply to securities, such as shares and bonds, and other investment instruments.

"3. [This law does not apply to bills of exchange, promissory notes and cheques.]"

Remarks

8. Draft article 2 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20). The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

9. The Working Group may wish to discuss the relationship between draft article 2, paragraph 1 and draft article 1, paragraph 2, of the draft provisions.

10. As a reference, the Working Group may wish to compare the language used in the "Rome II" Regulation,[2] to exclude from the application of the Regulation "non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character". Therefore, it is understood that "other transferable documents, such as investment securities and loans"[3] fall within the scope of the Regulation. However, the ultimate result may depend on domestic law, as, for instance, in certain jurisdictions shares and bonds are considered negotiable instruments and would therefore be excluded from the scope of the Regulation.

11. Paragraph 3 reflects the view that, if the final form of the draft provisions were a treaty, certain paper-based transferable documents or instruments should be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

12. Moreover, if the final form of the draft provisions were a model law, the Working Group may wish to consider whether paragraph 3 should be retained to

[2] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L 199, 31/7/2007, pp. 40-49.

[3] See Philip R. Wood, Conflict of Laws and International Finance (The Law and Practice of International Finance, Vol. 6), 2007, sub 11-043.

provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact that model law.

"Draft article 3. Definitions

"For the purposes of this law:"

Remarks

13. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition.

14. All references to "holder" in the draft provisions have been deleted and replaced with "person in control" (A/CN.9/804, para. 85). The Working Group may wish to clarify in draft article 3 that a "person" may either be a natural or a legal person.

"*electronic transferable record*" means [an electronic record] that entitles the person in control to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

"*paper-based transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the person in control to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.

Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.

Remarks

15. The definitions of "electronic transferable record" and "paper-based transferable document or instrument" reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). These definitions do not aim at affecting the fact that substantive law shall determine whether the person in control is the rightful person in control as well as the substantive rights of the person in control.

16. The definition of "electronic transferable record" does not aim at describing all the functions possibly related to the use of an electronic transferable record. For instance, an electronic transferable record may have an evidentiary value; however, the ability of that record to discharge that function will be assessed under law other than the draft provisions.

17. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under either of these two definitions and that the draft provisions should only focus on "transferable" documents (A/CN.9/797, paras. 27-28).

18. The Working Group may wish to consider whether the term "[indicated]" in square brackets in both draft definitions is appropriate or whether other terms might be used such as "incorporated", "specified" or "contained" (A/CN.9/797, para. 22).

19. The Working Group may wish to take into account the definition of "electronic record" when considering the definition of "electronic transferable record".

20. The Working Group may wish to consider deleting the definition of paper-based transferable document or instrument as it concerns substantive law.

21. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, which is inspired by article 2, paragraph 2 of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention"), should be included in the definition of "paper-based transferable document or instrument" or in explanatory material (A/CN.9/768 para. 34 and A/CN.9/797 paras. 25-26). The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

> "*electronic record*" means information generated, communicated, received or stored by electronic means [, including, where appropriate, all information logically associated or otherwise linked [together] [thereto] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently]].

Remarks

22. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996) and in the Electronic Communications Convention. The bracketed text aims at highlighting the fact that information may be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). That bracketed text is also meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43).

> "*issuer*" means a person that issues, directly or with the assistance of a third party, an electronic transferable record.

Remarks

23. The Working Group may wish to consider whether to retain the definition of "issuer" in light of the deletion of a draft provision on issuance (A/CN.9/797, paras. 64-67). The term "issuer" appears in draft articles 26 on replacement and 27 on division and consolidation.

24. The words ", directly or with the assistance of a third party," aim at clarifying that when an electronic transferable record is issued by a third-party service provider upon the issuer's request, the third-party service provider is not considered an issuer under the draft provisions (A/CN.9/768, para. 33).

> "*control*" of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].

Remarks

25. The Working Group may wish to consider the draft definition of "control" in conjunction with draft article 18 on possession.

> "*transfer*" of an electronic transferable record means the transfer of control over an electronic transferable record.

Remarks

26. At its forty-ninth session, the Working Group decided to delete a draft rule conveying that transfer of control over an electronic transferable record was necessary to transfer that electronic transferable record (A/CN.9/804, paras. 82 and 85). The Working Group may wish to consider whether to retain the draft definition of "transfer" in light of that decision as well as of draft article 23 on transfer.

> "*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 24.

Remarks

27. The Working Group may wish to consider whether to retain this definition in light of draft article 24 on amendment and of the remarks to that draft article. The term "amendment" occurs only in that draft article.

"*performance of obligation*" means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

Remarks

28. The Working Group may wish to consider whether to retain this definition, which refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22). The term "performance of obligations" appears in the definitions of "electronic transferable record" and of "paper-based transferable document or instrument".

"*obligor*" means the person [indicated] in a paper-based transferable document or instrument or in an electronic transferable record as having the obligation to perform [the obligation contained in that document, instrument or record].

Remarks

29. The definition of "obligor" has been reviewed in order to further clarify that it has only descriptive value and that substantive law shall determine who the obligor is.

30. The Working Group may wish to consider whether the definition of "obligor" should be retained in light of the fact that the notion may be defined under substantive law. The term "obligor", like the term "issuer", appears in draft articles 26 and 27, respectively on replacement, and division and consolidation.

31. If the definition of "obligor" is retained, the Working Group may wish to consider whether the term "[indicated]" in square brackets is appropriate or whether other terms might be used such as "incorporated", "specified" or "contained" (see above, para. 18).

"*replacement*" means substitution of a paper-based transferable document or instrument with an electronic transferable record or [vice versa] [conversely].

Remarks

32. The Working Group may wish to consider whether the definition should be limited to instances where there is change only in the medium in accordance with the procedure set out in draft article 26 on replacement, or whether it should be broadened to include instances where an electronic transferable record was reissued to substitute for another electronic transferable record according to draft article 25 (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

"*third-party service provider*" means a third party providing services related to [the use of] electronic transferable records [in accordance with articles 31 and 32]."

33. The words "[in accordance with articles 31 and 32]" are in square brackets pending deliberations of the Working Group on those draft provisions.

34. The Working Group may wish to consider whether the words [the use of] should be deleted to ensure consistency with the definition of "certificate service provider" contained in article 2(e) of the UNCITRAL Model Law on Electronic Signatures (2001).

"Draft article 4. Interpretation

"1. This law is derived from […] of international origin. In the interpretation of this law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].

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

Remarks

35. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions should be interpreted with reference to their international origin in order to facilitate uniform interpretation (A/CN.9/768, para. 35). The square bracketed text in paragraph 1 would depend on the final form of the draft provisions and the paragraph itself would need to be revised accordingly.

36. The notion of "general principles" contained in paragraph 2 has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that notion that has been most interpreted by case law.

37. The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) lists several general principles relevant to article 7 of the CISG according to case law, including: party autonomy; estoppel; place of payment of monetary obligations; mitigation of damages; and favor contractus. Those general principles may be contained in specific provisions of the CISG and applied in other cases falling under the scope of the CISG.

38. However, not all the general principles that have been identified in the CISG gather the same level of support in being recognised as such. Moreover, determination of the content and operation of those general principles takes place progressively. Such progressive determination assists in ensuring flexibility in the interpretation of the CISG and in adapting the CISG to evolving commercial practices and business needs.

39. The notion of "general principles" contained in draft article 4, paragraph 2, of the draft provisions refers to the general principles of electronic transactions (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the three fundamental principles of non-discrimination of electronic communications, technological neutrality and functional equivalence should be considered as general principles underlying the draft provisions. Other general principles might be identified as the work of the Working Group makes progress.

40. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant to define the notion of general principles contained in the draft provisions. In that respect, the Working Group may wish to consider whether a reference to good faith should be retained in the context of the draft provisions also in light of the fact that it is contained in other UNCITRAL texts on electronic commerce.

"***Draft article 5. Party autonomy [and privity of contract]***

"1. The parties may derogate from or vary by agreement the provisions of this law [except articles 1, 2, 4, 5 paragraph 2, 6, 7, […], 31 and 32].

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

41. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from

(A/CN.9/797, para. 32). It is suggested that such identification should be carried out at a later stage of preparation of the draft provisions, pending, in particular, discussion on the provisions relating to third-party service providers.

"Draft article 6. Information requirements

"Nothing in this law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

42. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law. (A/CN.9/797 para. 33).

B. Provisions on electronic transactions

43. The Working Group at its forty-eighth session decided to retain draft articles 7-9 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft provisions as well as the content of those articles.

"Draft article 7. Legal recognition of an electronic transferable record

"An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form."

Remarks

44. Draft article 7 sets forth the principle of non-discrimination. At its forty-ninth session, the Working Group decided to retain draft article 7 in its current form (A/CN.9/804, para. 17, see also A/CN.9/768, para. 39).

"Draft article 8. Writing

"Where the law requires that information should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to the use of an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."

Remarks

45. Draft article 8 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, paras. 18-19). It establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records (A/CN.9/797, para. 37). Draft article 8 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (ibid.). The general rule on functional equivalence between electronic and written form should be contained in the law on electronic transactions (A/CN.9/797, para. 38).

46. At the forty-ninth session, it was suggested that draft article 8 might not be necessary as the fulfilment of the functional equivalence of the "writing" requirement was implied in the definition of "electronic transferable record" in draft article 3. In response, it was stated that a rule on the "writing" requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions (A/CN.9/804, para. 18). The Working Group may wish to consider the desirability of maintaining draft article 8 in light of draft articles 10 to 12.

47. In case the draft provisions were to be applicable to electronic transferable records with no paper-based equivalent (see para. 7 above), the Working Group may wish to confirm that the law governing those records should set forth the same requirements contained in draft article 8, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

"Draft article 9. Signature

"Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic record was generated, in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."

Remarks

48. Draft article 9 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, para. 20). It establishes the requirements for the functional equivalence of "signature" (ibid.) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement) (A/CN.9/797, para. 46).

49. Reference in draft article 9, paragraph (b)(i) to "as reliable as appropriate" follows the approach adopted in article 9, paragraph 3 of the Electronic Communications Convention. Such approach to a method "as reliable as appropriate" is distinct from the references contained in other draft articles to a "reliable method". It is also distinct from the reference to a method "as reliable as appropriate" contained in draft article 18 since that draft article deals with functional equivalence of possession, which is not discussed in the Electronic Communications Convention.

50. The explanatory note to the Electronic Communications Convention provides guidance on the content and operation of that notion of "reliability" in the context of article 9, paragraph 3 of that Convention.[4] The Working Group may wish to consider whether the guidance provided in that explanatory note provides appropriate guidance in interpreting draft article 9, subparagraph (b)(i).

51. In that respect, the Working Group may also wish to clarify whether the general reliability standard contained in draft article 12 would apply also to draft article 9, subparagraph (b)(i) (A/CN.9/804, para. 20).

52. Another option would be to include in draft article 9 text similar to the requirements set forth in article 6, paragraph 3 of the Model Law on Electronic Signatures, thus providing a specific reliability standard applicable only to draft article 9, subparagraph (b)(i). It should, however, be noted that the Working Group had already agreed that such "two-tier" approach would not be adopted in the draft provisions (A/CN.9/797, para. 40).

Remarks on "original"

53. After noting that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47) and that the main purpose of a functional equivalence rule for that notion in the context of electronic transferable records should be the prevention of multiple claims (A/CN.9/804, para. 21), the Working Group agreed that there was no need to include a functional equivalence rule for "original" in the draft provisions (A/CN.9/804, para. 40). It was explained that the goal of avoiding multiple claims in the context of electronic transferable records could be achieved through the notion of "control". It

[4] United Nations, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007, paras. 161-164.

was further explained that the notion of "control" could identify both the person entitled to performance and the object of control.

C. Use of electronic transferable records

"Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]

"1. Where the law requires the use of a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by the use of [an] [one or more than one] electronic record if a reliable method is employed:

(a) To identify that electronic record as the [operative] electronic record to be used as an electronic transferable record and to prevent the unauthorized replication of that electronic transferable record;

(b) To render that electronic record capable of being subject to control during its life cycle; and

(c) To retain the integrity of the electronic transferable record.

["2. A method satisfies

subparagraph 1(a), if [it meets the requirements set forth in draft articles 12, 18 and 19];

subparagraph 1(b), if [it meets the requirements set forth in draft articles 12, 18 and 19];

subparagraph 1(c), if [it meets the requirements set forth in draft articles 11 and 30]."]

54. Draft article 10 aims to offer a functional equivalence rule for the use of paper-based transferable documents or instruments by setting forth the requirements to be met by an electronic record. The Working Group agreed to introduce draft article 10 in light of its discussions on the notion of uniqueness and its decision to delete a rule on uniqueness (A/CN.9/804, paras. 71 and 74). It was added that resorting to the notion of "control" would make it possible not to refer to the notion of "uniqueness", which posed technical challenges (A/CN.9/804, para. 38).

55. The words "[one or more than one]" illustrate that in certain registry systems there might be data elements that, taken together, provided the information constituting the electronic transferable record, with no discrete record constituting the electronic transferable record. The Working Group may wish to consider whether to retain those words or whether the definition of "electronic record" in draft article 3 sufficiently covers such possibility (A/CN.9/804, para. 71).

56. The Working Group may also wish to consider whether draft article 12, providing a general reliability standard, would suffice in providing guidance on the reliability standard applicable to draft article 10, subparagraphs 1(a) and (b).

57. The Working Group may wish to consider whether draft article 10, subparagraph 1(c), should be retained in that article or as a paragraph is a separate article on integrity (see draft article 11, paragraph 1). In case draft article 10, subparagraph 1(c) is retained, the Working Group may wish to clarify whether draft article 11, paragraph 2, would provide sufficient guidance on the reliability standard.

58. The Working Group may wish to consider whether draft article 10 should be placed closer to draft article 18 relating to "control" (A/CN.9/804, para. 75).

"Draft article 11. Integrity of an electronic transferable record

"1. A reliable method shall be employed to retain the integrity of an electronic transferable record from its issuance.

"2. For the purposes of [paragraph 1][draft article 10[1](c)]:

(a) The criteria for assessing integrity shall be whether information contained in the electronic transferable record, including any [legally relevant] [authorized] change that arises throughout the life cycle of the electronic transferable record, has remained complete and unaltered [apart from any change which arises in the normal course of communication, storage and display][, and in accordance with draft article 30]; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

Remarks

59. Draft article 11 reflects the deliberations of the Working Group at its forty-ninth session (A/CN.9/804, paras. 27-33 and 40). It is inspired by article 8, paragraph 3 of the Model Law on Electronic Commerce.

60. Draft article 11, subparagraph 2(a), indicates that an electronic transferable record retains integrity when any set of information related to legally relevant changes during its life cycle (as opposed to changes of purely technical nature) remains complete and unaltered (A/CN.9/804, para. 29).

61. The Working Group may wish to consider whether to retain the words "[authorized]" in draft article 11, subparagraph 2(a), taking into consideration the views expressed at its forty-ninth session (A/CN.9/804, paras. 30-32).

62. Regarding how the changes of a technical nature would be treated under draft article 11, guidance should be sought from article 8, subparagraph (3)(a) of the Model Law on Electronic Commerce (A/CN.9/804, para. 33). Consequently, the Working Group may wish to consider adding the following words "[apart from any change which arises in the normal course of communication, storage and display]".

63. In considering the draft article on amendment, the Working Group agreed that a rule on a reliable method to record legally relevant changes to the information contained in an electronic transferable record should be inserted, in square brackets, for consideration at a future session (A/CN.9/804, para. 86). The Working Group may wish to consider whether the addition of the words "legally relevant" in draft article 11, subparagraph 2(a), would suffice to impose an obligation of reliably recording legally relevant changes to the electronic transferable records.

64. The Working Group may wish to consider whether draft subparagraph 2(b) should be moved to draft article 12, as its first paragraph, so that it would contribute to providing general guidance on the reliability standard. In considering that draft provision, the Working Group may wish to take into consideration article 17, paragraph 4, of the Model Law on Electronic Commerce.

65. The Working Group at its forty-ninth session agreed that reference to draft article 30 on retention of information in an electronic transferable record should be included in this draft article (A/CN.9/804, para. 33). However, the Working Group may wish to consider whether the reference to draft article 11 contained in draft article 30 would suffice, reflecting the fact that the requirements for integrity apply to retention as well. In that case, the Working Group may wish to delete the words "[, and in accordance with draft article 30]".

"Draft article 12. General reliability standard

"In determining whether, or to what extent, a method is reliable for the purposes of [articles 10, 11, 18 and …], regard may be had to the following factors:

(a) Level of assurance of data integrity;

(b) Ability to prevent unauthorised access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(f) [Any agreement among the parties;] and

(g) Any other relevant factor.

Remarks

66. Draft article 12 is inspired by article 10 of the UNCITRAL Model Law on Electronic Signatures, which provides guidance on how to assess trustworthiness of systems, procedures and human resources used by a certification service provider (A/CN.9/797, para. 89).

67. Different views were expressed with respect to the desirability of inserting a general reliability standard in the draft provisions.

68. On the one hand, it was indicated that the draft provisions should provide general guidance on the meaning of reliability and set out the criteria for meeting that standard. It was added that, while party autonomy could suffice to establish reliability standards in closed systems, there still was a need for the draft provisions to set out reliability standards applicable to open systems. It was further mentioned that if a general reliability standard were to be included, it should be drafted in a manner mindful of technological neutrality (A/CN.9/804, para. 43).

69. On the other hand, it was stated that the presence of a general reliability standard could hamper use of electronic transferable records as legal consequences of failure to meet those standards were not clear. It was further indicated that caution should be exercised so as not to make the draft provisions untenable in practice. It was also noted that there was no need for a general reliability standard as each draft article containing a reliability standard should include in itself a provision specific to that context (A/CN.9/804, para. 42).

70. At the Working Group's forty-ninth session, the inclusion of additional factors to assess reliability was suggested. Those factors related to: quality of staff; sufficient financial resources and liability insurance; existence of a notification procedure for security breaches and of reliable audit trails (A/CN.9/804, paras. 44-45).

71. Draft subparagraph (f) was inserted to highlight the relevance of any parties' agreement when assessing the reliability of the method.

72. However, the view was also expressed that the existing and newly-suggested reliability factors were too detailed and that the provision was regulatory in nature. It was added that the adoption of such detailed requirements could impose excessive costs on business and ultimately hamper electronic commerce. It was further noted that those requirements could lead to increased litigation based on complex technical matters. It was suggested that a reference to reliable methods based on internationally accepted standards and practices should instead be inserted in the draft provisions (A/CN.9/804, para. 46).

73. In conclusion, the Working Group agreed to further consider draft article 12 as a possible general rule on system reliability and in connection with provisions relating to third-party service providers.

74. The Working Group may also wish to discuss whether draft article 12, subparagraph (a), should refer to data integrity in the system, to integrity of the electronic transferable record or to both, in light also of draft article 11.

75. The Working Group may also wish to discuss whether draft article 12, subparagraph (b), should explicitly refer to unauthorized access and use of the system or of the method employed to establish control, in light also of draft article 18.

76. The Working Group also agreed to consider the adoption of specific standards for each draft provision referring to a reliable method (A/CN.9/804, para. 49).

77. The following draft articles refer to a specific standard for the assessment of reliability: draft article 9 on signatures, draft article 11 on integrity and draft articles 18 and 19 on possession and control. The Working Group may wish to confirm that the general reliability standard contained in draft article 12 would also apply to those draft articles.

78. Draft articles 10 on the functional equivalent of paper-based transferable documents or instruments, 24 on amendment, 27 on division and consolidation, 28 on termination and 29 on use for security right purposes contain a reference to the use of a reliable method in performing operations related to the life cycle of an electronic transferable record. The Working Group may wish to confirm whether draft article 12 would be sufficient to assess the reliability of the various methods referred to in those draft articles, or if additional guidance should be sought in the standards contained in draft articles 18 and 19.

(A/CN.9/WG.IV/WP.130/Add.1) (Original: English)
Note by the Secretariat on draft provisions on electronic transferable records

ADDENDUM

Contents

II. Draft provisions on electronic transferable records (*continued*)

C. Use of electronic transferable records (Articles 13-30)

"Draft article 13. Time and place of dispatch and receipt of electronic transferable records

["1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

"2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

"3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

"4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article.]

["Where the law requires [or permits] the indication of a time or a place with respect to the use of a paper-based transferable document or instrument, a reliable method shall be employed to indicate that time or place with respect to the use of an electronic transferable record".]

Remarks

1. At the Working Group's forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61; see also A/CN.9/768, paras. 68-69). The Working Group may wish to consider whether draft article 13, based on a provision designed

for the exchange of electronic communications, could adequately provide for electronic transferable records.

2. Moreover, the Working Group may wish to clarify which are the substantive law requirements with respect to the time and place of dispatch and receipt of a paper-based transferable document or instrument and what legal consequences are attached thereto. In order to transpose those requirements in an electronic environment, a functional equivalence rule has been inserted for consideration of the Working Group.

3. In particular, the Working Group may wish to consider how draft article 13 could operate in registry systems where an electronic transferable record might circulate without being sent to or received at an electronic address. Existing practice with respect to registry systems seems to rely on time-stamping services to record the availability of information in that system. In turn, the availability of information in the system may be the legally relevant moment according to substantive law or contractual agreement, regardless of that information being communicated.[1] On the other hand, practice based on substantive law may allow for the parties' agreement on relevant time, which would then not correspond to the moment when the event is recorded in the system.

4. The Working Group may also wish to consider whether draft article 13 would adequately address the matter in case of use of a token-based system. In that respect, the Working Group may also wish to specifically consider whether, in case of transfer of the electronic transferable record by transmission of its storage medium (e.g., USB key or smart card), the use of an electronic medium would pose specific challenges or if the rule contained in substantive law would apply.

5. An alternative draft of article 13 submitted for the consideration of the Working Group aims at providing a functional equivalent for satisfying date and time requirements that may be set forth in substantive law.

6. The Working Group may further wish to consider defining the terms "originator", "addressee" and "electronic address". Moreover, the Working Group may wish to discuss the relationship between "originator", "issuer" and "transferor".

"Draft article 14. Consent to use an electronic transferable record

"1. Nothing in this law requires a person to use an electronic transferable record without his or her consent.

"2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

7. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

[***"Draft article 15. [Issuance of] multiple originals***

"1. Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with respect to the use of electronic transferable records by [issuance of multiple [operative] electronic records].

["2. The total number of multiple [operative] electronic records issued shall be indicated in those multiple records.]

["3. Where multiple [operative] electronic records have been issued, any requirement for presentation of more than one original of a paper-based

[1] Recommendation 11 of the UNCITRAL Guide on the Implementation of a Security Rights Registry states that the registration of a notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

transferable document or instrument is met by the presentation of one [operative] electronic record[, unless the parties have agreed otherwise.]]"]

Remarks

8. Draft article 15 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). It aims at introducing the possibility of issuing multiple electronic records, each controlled by a different entity, if so wished. However, it should be noted that the same functions pursued with the issuance of multiple paper-based transferable documents or instruments might be achieved in an electronic environment, especially if based on a registry system, by attributing selectively control on one electronic transferable record to multiple entities.

9. The possibility of issuing multiple originals of a paper-based transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49). However, commentators on maritime transport law do not recommend this practice, unless absolutely commercially necessary, due to the possibility of multiple claims for the same performance based on each originals.

10. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules") specifically allows for the issuance of multiple originals of negotiable transport documents. In particular, its article 47, paragraph 1(c) sets forth that: "If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity". This rule, which applies to paper-based transport documents, reflects current practice. Article 47, paragraph 1(c) of the Rotterdam Rules also deals with negotiable electronic transport records, but does not contain any provision for multiple negotiable electronic transport records.

11. Rule 4.15 of the International Standby Practices — ISP 98, dealing with "Original, Copy and Multiple Documents" allows for presentation of an electronic record, which "is deemed to be an 'original'", but does not contain any provision on presentation of multiple "original" electronic records.

12. Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP"), dealing with "Originals and Copies", sets forth that: "Any requirement of the UCP or a eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record". The commentary to that article explains that the concept of a full set of bills of lading is anachronistic in an electronic environment and would be satisfied by the presentment of a required electronic record "unless the credit expressly provided otherwise with sufficient specificity to indicate what was wanted".

13. Paragraph 2 of draft article 15 contains a provision inspired by article 36, paragraph 2(d) of the Rotterdam Rules and aims at informing all concerned parties of the number of operative electronic records in circulation. The Working Group may wish to consider whether such rule would be desirable in light of the specific features of electronic transferable records, or if such requirement should be satisfied only if already contained in substantive law.

14. Paragraph 3 of draft article 15 contains a provision inspired by article e8 eUCP. The Working Group may wish to consider whether that paragraph should be retained and, if so, whether it should be placed in draft article 21 on presentation. The Working Group may also wish to consider whether the words "[, unless the parties have agreed otherwise.]" should be retained to stress the possibility for the parties to agree on different modalities, or whether draft article 5 on party autonomy, applicable also to draft article 15, paragraph 3, would suffice.

15. The Working Group may wish to consider whether a provision explicitly forbidding the co-existence of multiple originals on different media should be inserted in the draft provisions.

16. Draft articles 15 and 16 are the only draft provisions that explicitly refer to issuance (see A/CN.9/797, paras. 64-69).

"Draft article 16. Substantive information requirements of electronic transferable records

"Nothing in this law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument."

Remarks

17. Draft article 16 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record than that required for a corresponding paper-based transferable document or instrument.

18. The Working Group may wish to clarify whether the information requirement contained in draft article 26(1)(b), which aims at ensuring the perduring availability of information in case of change of medium, represents an exception to this rule.

"Draft article 17. Additional information in electronic transferable records

"Nothing in this law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument."

Remarks

19. Draft article 17 states that an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument. In particular, some information could be included in an electronic transferable record due to its dynamic nature but not in a paper-based document or instrument (A/CN.9/768, para. 66 and A/CN.9/797, para. 73).

"Draft article 18. Possession

"1. Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met with respect to the use of an electronic transferable record if:

(a) A method is used to establish control of that electronic transferable record [and to identify the person in control]; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic transferable record was [created] [generated], in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

["2. An electronic transferable record shall be capable of [control][being subject to control] by [a single] [one or more] person during its life cycle.]"

Remarks

20. Draft article 18 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83) and forty-ninth sessions (A/CN.9/804, paras. 51-62 and 63-67).

21. The Working Group may wish to consider whether the word "control" might need to be further clarified taking into consideration the definition of control in draft article 3.

22. The words "[and to identify the person in control]" aim at providing a functional equivalent of the relation between possessor and object of possession, which is a fundamental element of the notion of possession in the physical world.

23. The Working Group may wish to consider whether the word "[created]" or "[generated]" should be retained in order to indicate that the assessment of the reliability of the electronic transferable record may change in light of the type of that record (A/CN.9/804, para. 67).

24. The Working Group may further wish to consider whether to retain draft paragraph 2 that has been added to introduce the requirement that control be exercised throughout the life cycle of the electronic transferable record. The Working Group may wish to consider whether the words "[from the time of its issuance]" should be inserted in paragraph 2 in light of the fact that the draft provisions do not contain a separate provision on issuance.

25. At the forty-ninth session, it was recalled that draft article 18, paragraph 2, was the only draft provision that embodied the idea that an electronic transferable record should be subject to control from the time of its issuance until it ceased to have any effect or validity. However, it was explained that an electronic transferable record need not necessarily be subject to control during its entire life cycle. It was said that that occurred, for instance, when a token-based electronic transferable record was lost. Therefore, it was suggested that that paragraph should instead indicate that an electronic transferable record was capable of being controlled during its life cycle, particularly in order to allow for its transfer. In response, it was noted that the notion of being subject to control was implicit in an electronic transferable record (A/CN.9/804, para. 61).

26. As for its placement, it was suggested that draft article 18, paragraph 2, could be included in the definition of electronic transferable record, or in the provision on uniqueness, or in a separate article (A/CN.9/804, para. 62).

27. The general rule offering guidance on elements to be considered when assessing reliability is contained in draft article 12. The Working Group may wish to clarify the relationship between draft article 12 and draft article 18.

Draft article 19. [Presumption of person in control]

"A person is deemed to have control of an electronic transferable record if:

(a) the electronic transferable record identifies that person as the person [in control] [asserting control] [who, directly or indirectly, has control over the electronic record]; and

(b) the electronic transferable record is [maintained] by that person."

Remarks

28. Draft article 19, which refers to a requirement previously contained in Option X of draft article 19 in A/CN.9/WG.IV/WP.128/Add.1, is the only draft provision aimed at identifying the person in control. It does so by establishing a presumption that a person is deemed to have control if the electronic transferable record identifies that person as the person in control and that person is actually able to exercise control. With respect to the latter condition, the Working Group may wish to consider whether the word "[maintained]" is appropriate. The verb "maintain" is used in Section 16(c)(3) of the Uniform Electronic Transactions Act and in Section 9-105 of the Uniform Commercial Code.

"Draft article 20. Delivery

"Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that

requirement is met with respect to the use of an electronic transferable record through the transfer [of control] of an electronic transferable record."

Remarks

29. The Working Group may wish to consider deleting the words "of control" in draft article 20 in light of the definition of "transfer" in draft article 3.

"Draft article 21. Presentation

["Where the law requires a person to present a paper-based transferable document or instrument [or provides consequences for non-presentation], that requirement is met with respect to the use of an electronic transferable record if that person demonstrates that it has control of the electronic transferable record and indicates the intention to present the electronic transferable record."]

Remarks

30. At its forty-ninth session, the Working Group decided to retain draft article 21 in square brackets for consideration after clarifying the possible meanings and functions of presentation (A/CN.9/804, para. 79).

31. In particular, it was said that further elements needed to be included in addition to demonstration of control, such as the intention to present the electronic transferable record. It was also suggested that the draft article should state that the person "required to present" must demonstrate that it has control (A/CN.9/804, para. 77). Draft article 21 has been revised accordingly.

32. With respect to the use of the term "presentation" in uniform texts, it should be noted that the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) uses the term "presentment" with reference to both acceptance and payment, while the Convention Providing a Uniform Law for Cheques (Geneva, 1931) uses the term "presentment" with reference to payment only. The term "presentation" is used in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995), which, however, does not deal directly with paper-based transferable documents or instruments. The Conventions on carriage of goods by sea do not use the term "presentation" but rather "surrender".

33. The Working Group may wish to consider whether the words "[or provides consequences for non-presentation]" should be retained.

"Draft article 22. Endorsement

"Where the law requires [or permits] the endorsement in any form of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to the use of an electronic transferable record if information relating to the endorsement is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9."

Remarks

34. Draft article 22 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, paras. 80-81). The words "in any form" have been added to ensure that all modalities of endorsement in a paper-based environment would be captured (A/CN.9/804, para. 80).

35. The words "[logically associated or otherwise linked to]" can also be found in the definition of "electronic record" in draft article 3. The words "[included in]" can be found in draft article 24 with respect to amendment of an electronic transferable record and in other draft provisions. While the words "logically associated or otherwise linked to" might be technically more accurate, the view was expressed that both wordings should be retained as they were not mutually exclusive (A/CN.9/804, para. 81). The Working Group may wish to consider which wording is more

appropriate and provide guidance on their uniform use throughout the draft provisions.

36. The Working Group may wish to confirm that issues relating to the validity of an endorsement remain a matter of substantive law.

37. The Working Group may wish to consider adopting standard language for reference to non-mandatory legal requirements (i.e., cases in which the law permits, but does not require, a certain activity, such as those dealt with in draft articles 22, 23, 24, 25, 27, 28 and 29).

"Draft article 23. Transfer of an electronic transferable record

"[[Subject to any rule of law governing the transfer of a paper-based transferable document or instrument][When permissible under applicable law], the person in control may:

(a) transfer to a named person an electronic transferable record issued or transferred to bearer; or

(b) transfer to bearer an electronic transferable record issued or transferred to a named person.]"

Remarks

38. Draft article 23 reflects the deliberations of the Working Group at its forty-ninth session (A/CN.9/804, paras. 82-85). It aims at clarifying the possibility for the person in control to change the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case ("blank endorsement") when permissible under applicable law. The bracketed text aims at highlighting the fact that the change in the rules for transfer of the electronic transferable record (i.e., to bearer or to order) must be permissible under applicable substantive law. Differences between the two sets of bracketed text are intended to be editorial only.

39. Reference to "holder" has been substituted with reference to "person in control" throughout the draft provisions (A/CN.9/804, para. 85).

40. The Working Group may wish to note that a provision dealing with the possibility of issuing electronic transferable records to bearer has been deleted as that possibility was encompassed in draft article 1, paragraph 2 (A/CN.9/797, para. 65).

"Draft article 24. Amendment of an electronic transferable record

"1. Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], a reliable method shall be employed for amendment of information in an electronic transferable record whereby [all] the amended information is [accurately] reflected in the electronic transferable record and is readily identifiable as such.

"2. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record."

Remarks

41. Draft article 24 has been recast in light of the suggestions received at the Working Group's forty-eighth session (A/CN.9/797, para. 101). It aims at providing a functional equivalence rule for instances in which an electronic transferable record may be amended.

42. The words [or permits] aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record by virtue of party autonomy but does not require it.

43. The words [all] and [accurately] aim at providing drafting options to introduce a duty to document any relevant change in the information contained in the electronic transferable record (A/CN.9/797, para. 72).

44. Draft paragraph 2 aims at satisfying the goal of documenting changes to the electronic transferable record by requiring a statement relating to the amendment. That information requirement might not exist with respect to paper-based transferable documents or instruments due to the fact that amendments on paper are self-evident.

45. In considering the standards for assessing the reliability of the method used for amendment of an electronic transferable record, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

"Draft article 25. Reissuance

"1. Where the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued.

"2. Upon reissuance of an electronic transferable record, a statement to the effect that a reissuance has taken place shall be included in the electronic transferable record."

Remarks

46. Draft article 25 has been recast in light of the suggestions at the forty-eighth session (A/CN.9/797, para. 104). It now aims at providing a general rule on reissuance of electronic transferable records, which is possible whenever allowed by substantive law. The Working Group may wish to clarify that the provision would apply to technical issues specific to the use of electronic means, such as the corruption of the method of control of an electronic transferable record.

"Draft article 26. Replacement

"1. If a paper-based transferable document or instrument has been issued and the person in control and the [issuer/obligor] agree to replace that document or instrument with an electronic transferable record:

(a) The person in control shall [present] [surrender] [for replacement] the paper-based transferable document or instrument to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the person in control, in place of the paper-based transferable document or instrument, an electronic transferable record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) [After] [Upon] issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

"2. If an electronic transferable record has been issued, and the person in control and the [issuer/obligor] agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The person in control shall [present] [surrender] [for replacement] [transfer control of] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the person in control, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) [After] [Upon] issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

"3. Parties may consent to replacement at any time prior [or simultaneously] to the replacement.

"4. Replacement according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

"5. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the electronic transferable record has not been issued for technical reasons, the paper-based transferable document or instrument may be reissued [or the replacing electronic transferable record may be issued].

"6. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the paper-based transferable document or instrument has not been issued for technical reasons, the electronic transferable record may be reissued [or the replacing paper-based transferable document or instrument may be issued]."

Remarks

47. Draft article 26 reflects the suggestions made at the Working Group's forty-eighth session (A/CN.9/797, paras. 102-103).

48. The Working Group may wish to consider whether the word "[upon]" should be replaced by the word "[after]" to more accurately indicate that cessation of validity and effect is subject to successful issuance of the replacing record, or document or instrument. Alternatively, the Working Group may wish to consider specifying in draft article 26 that the replaced record, or document or instrument, will cease to have effect or validity only after issuance of its replacement.

49. The Working Group may wish to clarify whether the words "all information" in subparagraph 2(b) refer to substantive information only or also include technical information specific to the electronic medium (A/CN.9/797, para. 103).

50. The Working Group may wish to further discuss which parties, in addition to the person in control, ought to consent to or otherwise be involved in the replacement as it is unlikely that the substantive law would have any provision regarding the change of medium (A/CN.9/761, para. 76). The Working Group may wish to consider that, while a replacement would generally require the consent of the obligor(s), the obligor would, in such a case, be able to request a replacement when the document, instrument or record is presented (A/CN.9/768, para. 101). Thus, requiring the obligor's consent for replacement prior to presentation might not be necessary.

51. Draft paragraph 3 aims at providing the possibility of prior consent to replacement. The Working Group may wish to consider that draft paragraph in conjunction with draft article 14 providing a general rule on consent requirement.

52. The Working Group may wish to consider whether to retain draft paragraph 4, whose purpose is to clarify that substantive rights and obligations are not affected by replacement, or to include such clarification in the explanatory material.

53. Draft article 26, paragraphs 5 and 6 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but the corresponding record, document or instrument has not been issued for technical reasons. Such rule may not be contained in substantive law since it is specific to replacement involving an electronic transferable record.

54. The Working Group may wish to consider whether the word "[terminated]" is adequate for the purpose of draft paragraphs 5 and 6, which refer to situations where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in draft subparagraphs 1(c) and 2(c). The word "[invalidated]" might offer an alternative drafting option.

"Draft article 27. Division and consolidation of an electronic transferable record

"1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, a reliable method for division or consolidation of an electronic transferable record shall be provided.

"2. If an electronic transferable record has been issued and the person in control and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The person in control shall [transfer] [present for division] the electronic transferable record to the [issuer/obligor];

(b) Two or more new electronic transferable records shall be issued and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the pre-existing electronic transferable record and the new electronic transferable records; and

(c) Upon division, the pre-existing electronic transferable record ceases to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the resulting new electronic transferable records.

"3. If the person in control of two or more electronic transferable records, the [issuer/obligor] of which is the same, agrees with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The person in control shall [transfer] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The consolidated electronic transferable record shall be issued and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the pre-existing electronic transferable records;

(c) Upon consolidation, the pre-existing electronic transferable records cease to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the consolidated electronic transferable record."]

Remarks

55. Draft article 27 reflects the Working Group's suggestions at its forty-eighth session (A/CN.9/797, para. 106). In deliberating, the Working Group may wish to refer also to the considerations expressed in A/CN.9/WG.IV/WP.124/Add.1, paragraphs 33 and 34. The use of the word "transfer" instead of the word "present" is suggested in order to avoid reference to substantive law notions.

56. In considering the standards for assessing the reliability of the method used for division and consolidation of electronic transferable records, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

"Draft article 28. Termination of an electronic transferable record

"1. Where the law requires or permits the termination of a paper-based transferable document or instrument, a reliable method shall be provided to prevent further circulation of the electronic transferable record."

"2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated."

Remarks

57. Draft article 28 reflects the suggestions made at the forty-eighth session (A/CN.9/797, para. 106). It now contains a general functional equivalence rule.

58. In considering the standards for assessing the reliability of the method used for termination of an electronic transferable record, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

"Draft article 29. Use of an electronic transferable record for security right purposes

"Where the law permits the use of a paper-based transferable document or instrument for security right purposes, a reliable method to allow the use of electronic transferable records for security right purposes shall be provided."

Remarks

59. Draft article 29 reflects the suggestion made at the forty-eighth session that it should be formulated as a functional equivalence rule (A/CN.9/797, para. 106).

60. In considering the standards for assessing the reliability of the method used for the use of an electronic transferable record for security right purposes, the Working Group may wish to refer to draft article 12, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.130, para. 72).

"Draft article 30. Retention of [information in] an electronic transferable record

"1. Where the law requires that a paper-based transferable document or instrument be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 11[, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information enabling the identification of the [issuer and person in control of the electronic transferable record] [parties] and [indicating the date and time [when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated]]] [of legally relevant events] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record [and indicating the date and time of their involvement] is made available].

"2. A person may satisfy the requirement referred to in paragraph 1 by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met."

Remarks

61. Draft article 30 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to take into consideration draft article 11 on integrity when discussing draft article 30.

62. The Working Group may wish to consider whether reference should be made to retention of an electronic transferable record in spite of the fact that the retained electronic record may no longer be transferred. In that respect, the Working Group may wish to consider making reference to the information contained in the electronic transferable record.

63. The words "[, apart from any change that arises from the need to ensure that the record may not further circulate]" were added in subparagraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

64. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72). In particular, the words "[parties]" and "[of legally relevant events]" have been added in subparagraph 1(c) to capture all parties and events relevant during the life cycle of the electronic transferable record. References to the date and time of relevant events have also been added. The Working Group may wish to consider whether those drafting suggestions should be retained and, if so, whether the resulting subparagraphs 1(c) and 1(e) coincide in scope and operation. In that regard, the Working Group may also wish to clarify whether requirements on the information to be retained should be set forth in substantive law.

65. The Working Group may also wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

66. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft provisions (A/CN.9/797, para. 104, subpara. (b) and A/CN.9/WG.IV/WP.124/Add.1, para. 43). In that case, the Working Group may wish to clarify whether that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

D. Third-party service providers (Articles 31-32)

"Draft article 31. Conduct of a third-party service provider

"Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with statements made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy of all statements made by it;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify the [[issuer/obligor] and the person in control] [concerned parties];

(ii) That the electronic transferable record has retained its integrity and has not been compromised;

(iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(e) Use trustworthy systems, procedures and human resources in performing its services."

"Draft article 32. Trustworthiness

"For the purposes of article 31, subparagraph (e) in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of electronic transferable records;

(d) Availability of information to related parties;

(e) Regularity and extent of audit by an independent body;

(f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and

(g) Any other relevant factor."

67. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 31 and 32 on third-party service providers had already been revised in light of the considerations expressed by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

68. The placement of these draft articles would depend on the final form of the draft provisions. It was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

69. The words "[concerned parties]" have been added in draft article 31 subparagraph (d)(i) to require identification of all parties relevant during the life cycle of the electronic transferable record. This is necessary, for instance, to ensure the possibility of an action in recourse.

70. The Working Group may also wish to clarify the meaning of the term "relying party" in draft article 31 (A/CN.9/797, para. 107).

E. Cross-border recognition of electronic transferable records (Article 33)

"Draft article 33. Non-discrimination of foreign electronic transferable records

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used [in a foreign State][abroad][, or that its issuance or use involved the services of a third party based, in part or wholly, [in a foreign State][abroad]][, if it offers a substantially equivalent level of reliability].

"2. Nothing in this law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records."

Remarks

71. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[2] The Working Group also reiterated the importance of cross-

[2] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

72. Draft article 33 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

73. The Working Group may wish to clarify if under draft article 33 an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognised in another jurisdiction enacting draft article 33.

74. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words "[, if it offers a substantially equivalent level of reliability]" are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

75. Paragraph 2 reflects the Working Group's understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

C. Report of the Working Group on Electronic Commerce on the work of its fifty-first session (New York, 18-22 May 2015)

(A/CN.9/834)

[Original: English]

Contents

I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[1]

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.[2]

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions during the colloquium on electronic commerce (New York, 14-16 February 2011).[3] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[4] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules").[5] In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[6]

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

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[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.
[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.
[3] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.
[4] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.
[5] Ibid., para. 235.
[6] Ibid.

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.[7] There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate cross-border use of electronic transferable records was emphasized.[8] In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.[9] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.[10]

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field. It was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision to be made by the Working Group on the final form (A/CN.9/761, paras. 90-93).

7. At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14). As to future work, it was noted that while the draft provisions were largely compatible with different outcomes that could be achieved, caution should be exercised to prepare a text that had practical relevance and supported existing business practices, rather than regulated potential future ones (A/CN.9/768, para. 112).

8. At its forty-sixth session, in 2013, the Commission noted that the work of the Working Group would greatly assist in facilitating electronic commerce in international trade.[11] After discussion, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[12] It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.[13]

9. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) (A/CN.9/797, paras. 109-112).

10. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and its addendum. The Working Group focused on the discussion on the concepts of original, uniqueness, and integrity of an electronic transferable record based on principles of functional equivalence and technological neutrality.

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[7] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 82.
[8] Ibid., para. 83.
[9] Ibid.
[10] Ibid., para. 90.
[11] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 227.
[12] Ibid., paras. 230 and 313.
[13] Ibid., para. 313.

11. At its forty-seventh session, in 2014, the Commission took note of the Working Group's key discussions at its forty-eighth and forty-ninth sessions.[14] Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records.[15]

12. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was suggested that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30).

II. Organization of the session

13. The Working Group, composed of all States members of the Commission, held its fifty-first session in New York from 18 to 22 May 2015. The session was attended by representatives of the following States members of the Working Group: Armenia, Austria, Belarus, Brazil, China, Colombia, Denmark, Ecuador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Liberia, Malaysia, Mexico, Pakistan, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

14. The session was also attended by observers from the following States: Belgium, Egypt, Libya, Malta, Myanmar, Qatar and Sweden.

15. The session was also attended by observers from the European Union.

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

International non-governmental organizations: African Center for Cyberlaw and Cybercrime Prevention (ACCP), Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), CISG Advisory Council, Comité Maritime International (CMI), European Law Students' Association (ELSA), International Federation of Freight Forwarders Associations (FIATA), and Law Association for Asia and the Pacific (LAWASIA).

17. The Working Group elected the following officers:

Chairman: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Lasminingsih PRADJAKUSUMAH (Indonesia)

18. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.131); (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.132 and Add.1); and (c) Mobile commerce/payments effected with mobile devices, Possible future work — Proposal by Colombia (A/CN.9/WG.IV/WP.133).

19. The Working Group adopted the following agenda:

1. Opening of the session.

[14] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17).
[15] Ibid.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of the draft provisions on electronic transferable records.

5. Technical assistance and coordination.

6. Other business.

7. Adoption of the report.

III. Deliberations and decisions

20. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.132 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft provisions on electronic transferable records

Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]

Paragraph 1

21. With regard to paragraph 1, different proposals were made. One proposal was to combine and simplify subparagraphs 1(a) and (b). In response, it was said that that proposal omitted to identify the electronic transferable record, which was one of the two elements needed to achieve functional equivalence of the use of paper-based transferable documents or instruments, the other being control.

22. Another proposal was to include in draft article 10 the concept of uniqueness in order to achieve singularity of claims. In support, it was said that the notion of control alone did not suffice to achieve singularity given the difference between control itself and its object, i.e., the electronic transferable record.

23. In response, it was said that the Working Group had already discussed the concept of uniqueness at its previous sessions. It was stated that the concept of "control" resulted in the singularity of claims. It was also said that draft article 10 together with the definition of electronic transferable record contained in draft article 3 could provide adequate safeguard against the possibility of multiple claims.

24. With regard to subparagraph 1(a), broad support was expressed for the retention of the words in the first set of square brackets. Concerns were expressed that the second set of square brackets could be viewed as introducing an additional definition of electronic transferable record beside that provided in draft article 3.

25. In response, it was said that the words in the first set of square brackets did not describe how to identify the electronic transferable record, whereas the words in the second set of square brackets were preferable as they did so by referring to "authoritative information". It was added that the words "authoritative information" implied a useful reference to the notion of uniqueness. It was proposed to include the words "containing the authoritative information" in the definition of electronic transferable record under draft article 3. However, it was pointed out that the purpose of a definition was to explain the meaning of a term and should not have operative effect.

26. After discussion, the Working Group agreed to retain the words "to identify that electronic record as the electronic transferable record" outside the square brackets and to delete the second set of square brackets. The Working Group further agreed to include in the definition of electronic transferable record the words "containing the

authoritative information" in square brackets after the words "[an electronic record]" for further consideration of the Working Group.

Paragraph 2

27. With regard to the alternative wording in square brackets "legally relevant" and "authorized", different views were expressed. It was said that an electronic transferable record should only reflect authorized changes as those were relevant for ensuring integrity. It was stated that those changes would be authorized by system designers. Some support was also expressed for retaining the words "legally relevant" or using the word "legitimate".

28. However, it was also said that the term "authorized" would introduce a standard for electronic transferable records that did not exist for paper-based documents or instruments. In that regard, it was noted that any "authorized" change would be authorized by the parties to a transaction and not by a system developer. It was explained that only substantive law and party autonomy were relevant to define authorized changes and that therefore both drafting suggestions should be deleted. In that line, it was suggested to delete the words ", including any [legally relevant][authorized] change that arises [throughout its life cycle] [from its creation until it ceases to have any effect or validity]," since the draft definition of electronic transferable record already covered all changes in the life cycle of an electronic transferable record. In response, it was said that that suggestion did not capture the dynamic nature of an electronic transferable record, in which information necessarily changed. Reference was also made to draft articles 21 and 27 as relevant for the notion of integrity.

29. The Working Group agreed to retain the words "from its creation until it ceases to have any effect or validity" outside square brackets and to delete the words "life cycle" throughout the draft provisions.

30. After discussion, the Working Group agreed to delete the words "legally relevant", and to retain the words ", including any [authorized] change that arises from its creation until it ceases to have any effect or validity," in square brackets for further consideration.

Draft article 18. Delivery

31. It was recalled that under substantive law the transfer of a paper-based transferable document or instrument might require both the delivery of that document or instrument and its endorsement. In that regard, it was explained that the respective draft provision would therefore have to provide for the functional equivalent of both delivery and endorsement. However, it was added, under its current formulation, draft article 18 could be misread as establishing the transfer of an electronic transferable record, and not the transfer of control over that record, as functional equivalent to delivery.

32. In that line, broad support was expressed for adopting the alternative text of draft article 18 proposed in paragraph 33 of A/CN.9/WG.IV/WP.132/Add.1. It was indicated that the draft definition of transfer was redundant under that alternative draft of article 18 and therefore should be deleted and the words "transfer of control" should be used throughout the text where needed. As an editorial matter, it was also suggested to merge draft articles 17 and 18 to further improve clarity.

33. The Working Group agreed to retain the text of draft article 18 contained in paragraph 33 of A/CN.9/WG.IV/WP.132/Add.1 and to place it in draft article 17 as its paragraph 3. The Working Group further agreed to delete the definition of "transfer" contained in draft article 3.

Draft article 17. Possession

34. Different views were expressed with respect to the alternative wording in subparagraph 1(b)(i). It was stated that the term "generated" was used in other UNCITRAL texts without difficulty and was therefore preferable. However, it was

noted that the term "issued" was used in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules"). In response, it was said that the term "issued" had substantive law implications, and that therefore it was appropriate for a substantive text such as the Rotterdam Rules, but not for an enabling text such as the draft provisions (see also A/CN.9/828, paras. 52-54).

35. After discussion, the Working Group agreed to retain the term "generated" outside square brackets and to delete the term "issued".

Draft article 12. Time and place of dispatch and receipt of electronic transferable records

36. It was recalled that draft article 12 was based on existing UNCITRAL provisions dealing with electronic contracting. It was noted that time and place of dispatch and receipt had different relevance for contract formation and management, and for the use of electronic transferable records. In that line, broad support was expressed for the view that the alternative text in paragraph 5 of document A/CN.9/WG.IV/WP.132/Add.1 was preferable to paragraphs 1 and 2 of draft article 12. It was further noted that registry systems would record the relevant events in the life cycle of the electronic transferable record with time-stamping and that users of those systems would agree to contractual rules containing a choice of applicable law. Therefore, it was concluded, time and place of dispatch and receipt had limited practical relevance for electronic transferable records.

37. In response, it was said that private international law rules relied on the place of the transfer of paper-based documents or instruments to determine the applicable law. Hence, determining the place of receipt and dispatch of electronic transferable records was needed to provide legal certainty. It was added that the existence of different laws was a reality and that one purpose of the draft provisions was to pursue legal harmonisation.

38. It was further suggested that recording the time of endorsements was necessary to establish the sequence in the action of recourse given that the dematerialised nature of electronic transferable records did not make that sequence apparent as in paper-based documents or instruments.

39. One proposal was to include the words "unless otherwise agreed" at the beginning of draft article 12 to clarify that parties had autonomy in determining time and place of dispatch and receipt of electronic transferable records. In response, it was clarified that draft article 5 on party autonomy would apply to draft article 12.

40. The Working Group agreed to (i) substitute draft article 12, paragraphs 1 and 2 with the alternative text contained in paragraph 5 of A/CN.9/WG.IV/WP.132/Add.1; (ii) retain the words "or permits" outside the square brackets in the resulting draft article 12, paragraph 1; and (iii) retain draft article 12, paragraphs 3 and 4 in square brackets for further consideration of the Working Group.

"Where the law requires or permits"

41. With regard to the alternative texts proposed to reflect instances in which the law required or permitted certain actions, different views were expressed.

42. Broad support was expressed for the view that a requirement would not include cases in which the law merely permitted an action. Therefore, it was suggested that the words "or permits" should be retained outside square brackets in the alternative text proposed under paragraph 5 of document A/CN.9/WG.IV/WP.132/Add.1. However, the view was expressed that reference to requirement in the law would include as well instances in which the law merely permitted an action (see also A/CN.9/WG.IV/WP.132/Add.1, para. 8) and that therefore the words "or permits" were redundant and should be deleted.

43. The view was also expressed that draft article 12 should refer to the consequences in case a requirement was not met in order to deal with instances of

permission. To that end, different drafting proposals were made. In response, it was explained that any legal requirement implied consequences for the case it was not met, and that therefore the suggested language was redundant. For the sake of clarity, it was suggested that such understanding should be contained in explanatory materials accompanying the draft provisions.

44. With regard to the alternative drafts of article 12 under paragraphs 9 and 10 of document A/CN.9/WG.IV/WP.132/Add.1, it was said that the use of the word "shall" was preferable. It was noted that the words "may be" used in the two other alternative drafts would not be appropriate for instances "where the law requires".

45. A concern was expressed that the word "shall" could be misread as establishing new substantive requirements that would apply where the law permits an outcome. It was therefore suggested that language such as "the law is met" be used to address mandatory and permissive situations together. In response, it was stated that, in line with the principle of non-discrimination, where the law provided a possibility, a reliable method should be used only in case a party decided to avail itself of that possibility.

46. The Working Group requested the Secretariat to revise the draft provisions referring to requirement and permission in light of the text adopted for draft article 12, paragraph 1, and to reflect in explanatory materials the understanding that any legal requirement implied consequences for the case it was not met.

Draft article 14. [Issuance of] multiple originals

47. It was suggested that draft article 14 should focus on transferable documents as only those documents were in practice concerned by the use of multiple originals. In response, it was noted that uniform and national laws on multiple originals of transferable instruments, namely bills of exchange, existed and that those laws needed to be transposed in an electronic environment, too. In that respect, it was also noted that bills of exchange might be excluded from the scope of the draft provisions under draft article 2, paragraph 3.

48. A question was raised whether draft article 10, paragraph 1(a), in the part preventing the unauthorized replication of an electronic transferable record implicitly admitted its authorized replication and therefore the issuance of multiple originals. In that case, it was added, draft article 14 might be redundant.

49. In response, it was noted that that portion of draft article 10 dealt with copies, which did not have the same legal effects as original electronic transferable records, while draft article 14 explicitly enabled the use of multiple original electronic transferable records. Hence, it was concluded, draft article 14 should be retained.

50. After discussion, the Working Group agreed to retain draft article 14, paragraph 1, outside square brackets. It also agreed to remove the second set of square brackets, to delete the word "[operative]" and to insert the word "transferable" between "electronic" and "records".

51. It was indicated that the rule in draft article 14, paragraph 2, was useful but had a substantive nature. It was therefore suggested that it should be redrafted so as to limit its scope to cases where substantive law contained a requirement to indicate the number of multiple originals. The Working Group agreed on that suggested approach, pending consideration of a new text at a future session.

52. It was further indicated that draft article 14, paragraph 3, contained a substantive rule that was not appropriate for the draft provisions. It was added that article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP") was not appropriate in that context since it dealt with both originals and copies. After discussion, the Working Group agreed to delete draft article 14, paragraph 3.

Draft article 23. Change of medium

53. It was alternatively indicated that draft article 23 should aim at protecting the rights of the issuer, of the obligor and of the holder, and it was suggested that its focus should change accordingly. It was added that challenges were posed by the variety of schemes used in the various paper-based transferable documents or instruments, and, in particular, by the fact that issuer and obligor (drawee) did not correspond in a bill of exchange.

54. It was suggested that the draft article should be simplified in order to provide the flexibility needed to accommodate business practice. In that line, it was indicated that its main goal was to enable change of medium while ensuring that no information would be lost because of that change. It was further indicated that change of medium should not affect in any manner the rights and obligations of the parties.

55. It was added that the draft provision should indicate that the replaced document, instrument or record should cease to have any legal effect or validity. It was suggested that the draft article should set forth an obligation to retain the replaced document, instrument or record in order to facilitate verification of information in case of dispute.

56. It was also suggested that the draft article should explicitly require the insertion of a statement indicating the change of medium in the replacing document, instrument or record. It was explained that such provision would not create a new information obligation, as change of medium was an event to be recorded under general rules on integrity.

57. The following text of draft article 23 was suggested:

> "1. A change of medium of a paper-based transferable document or instrument to an electronic transferable record may be performed if a method that is as reliable as appropriate for the purpose of the change of medium is used whereby:
>
> (a) The electronic transferable document includes all the information contained in the paper-based transferable document or instrument;
>
> (b) A statement indicating a change of medium is inserted in the electronic transferable record;
>
> (c) A statement indicating that the paper-based transferable document or instrument has ceased to have any effect or validity is inserted in the paper-based transferable document or instrument; and
>
> (d) The paper-based transferable document or instrument is retained.
>
> 2. Upon issuance of the electronic transferable record in accordance with paragraph 1, the paper-based transferable document or instrument ceases to have any effect or validity.
>
> 3. A change of medium in accordance with paragraph 1 does not affect the rights and obligations of the parties."

58. It was explained that the requirements contained in paragraph 1, subparagraphs (a) to (d) were concurrent and that the sanction for non-compliance with any of them was the invalidity of the change of medium. It was also explained that the obligation to retain the document, instrument or record terminated due to change of medium was the same regardless of the medium.

59. With regard to subparagraph 1(d), it was said that the retention of a paper-based transferable document or instrument would be subject to different requirements than the retention of an electronic transferable record. It was further said that the requirements for retention of a paper-based transferable document or instrument would be set forth in substantive law.

60. A further suggestion was to recast the draft proposal to clearly set out the criteria for the reliable method as a new paragraph 2. According to that proposal, the word "whereby" in paragraph 1 would be deleted and the new paragraph 2 would begin

with the words “For the change of medium to take effect, the following requirements shall be met:”. Numbering and cross-reference to paragraphs would change accordingly. That proposal found broad support.

61. An additional suggestion was to include paragraph 3 in the chapeau of paragraph 1 to simplify the proposal. In response, it was said that it should be the result of paragraph 3 as a statement of law, and not the result of the use of a reliable method referred to in the chapeau of paragraph 1, that the rights and obligations of the parties were not affected, and that therefore those rights and obligations should be addressed separately for the sake of clarity.

62. A concern was expressed that the draft proposal did not determine whose consent was needed for a change of medium and that, as a result of the change of medium, parties could be obliged to use electronic means. In response, it was recalled that draft article 23 would be subject to draft article 13, which contained the general rule that the use of electronic means was voluntary. In addition, it was clarified that draft article 23 was intended to accommodate electronic transferable records corresponding to different types of paper-based transferable documents or instruments, and that substantive law would identify those parties whose consent was relevant for change of medium.

63. It was suggested to delete subparagraphs 2(c) and (d), since those requirements were not necessary and might result in practical challenges. In response, it was said that those requirements aimed at preventing fraud, as an obligor might not be able to determine on its face the invalidity of a paper-based transferable document or instrument that had been subject to change of medium. It was added that the compliance with subparagraph 2(c) as a condition for validity of the change of medium would prevent fraud. In turn, it was said that commercial operators could voluntarily include statements and adopt retention practices, if deemed useful. Broad support was expressed for the deletion of subparagraphs 2(c) and (d).

64. After discussion, the Working Group agreed: (i) to delete the words “whereby” in paragraph 1; (ii) that the new paragraph 2 would begin with the words “For the change of medium to take effect, the following requirements shall be met:”; (iii) to delete subparagraphs 2(c) and (d); (iv) and to delete paragraphs 4 and 5 of draft article 23 contained in paragraph 45 of document A/CN.9/WG.IV/WP.132/Add.1 as a result of the newly adopted draft article 23. The Working Group requested the Secretariat to prepare a corresponding provision for the change from electronic to paper medium.

Draft article 25. Termination of an electronic transferable record

65. The Working Group recalled its decision to delete the definition of “transfer” contained in draft article 3 (see paragraph 33 above).

66. It was said that the dematerialized nature of an electronic transferable record made its destruction difficult, which posed a risk of further circulation of the record to be destroyed, particularly when an issuer wished to destroy the original instrument when re-issuing that instrument. Therefore, it was stated that a provision on termination was necessary in order to provide a functional equivalent to the destruction of the paper-based instrument.

67. In response, it was explained that a distinction should be made between termination and destruction. It was said that the contract would provide for the instrument’s effectiveness to cease upon performance, and that termination was not made dependent upon formal requirements being met. Therefore, a functional equivalence rule on termination was not necessary. It was, however, suggested that a reliable method would be required to ensure that an electronic transferable record ceased to have effect.

68. After discussion, the Working Group agreed to delete draft article 25.

Draft article 26. Use of an electronic transferable record for security rights purposes

69. It was indicated that paper-based transferable documents or instruments were commonly used as collateral for security rights purposes and that the draft provisions should enable the same use of electronic transferable records. It was further indicated that the draft provisions should not aim at displacing any rule of law on security rights, in line with the general principle of their non-interference with substantive law.

70. It was said that whilst draft article 26 could be unnecessary, it may serve a useful declaratory value.

71. It was noted that the alternative draft of article 26 contained in paragraph 67 of document A/CN.9/WG.IV/WP.132/Add.1 referred to notions already contained in the draft provisions such as delivery or endorsement of electronic transferable records with respect to security rights. It was indicated that that alternative draft contained also references to substantive law concepts, such as "perfection of security rights or interests", which had different meaning in the various legal systems, and that therefore such references could introduce elements of disharmony.

72. It was stated that one definition of "securities" included security rights. Hence, the concern was expressed that the exclusion in draft article 2, paragraph 2, of securities from the scope of application of the draft provisions could be read as preventing the use of electronic transferable records for security rights purposes. In response, it was stated that the word "securities" in draft article 2, paragraph 2, did not extend to the use of electronic transferable records as collateral. Broad support was expressed for clarifying in explanatory materials on draft article 2, paragraph 2, that the draft provisions did not prohibit the use of electronic transferable records as collateral.

73. After discussion, the Working Group agreed that draft article 26 should be deleted. The Working Group also requested the Secretariat to clarify in the materials illustrating draft article 2, paragraph 2, that the term "securities" did not include security rights and that therefore the model law did not prevent the use of electronic transferable records for security rights.

Draft article 27. Retention of [information in] an electronic transferable record

74. Broad support was expressed for the view that draft article 27 aimed at retaining the information contained in an electronic transferable record, but not the transferable record itself. In that line, it was said that an assumption underlying draft article 27 was that the record to be retained had been terminated and could not further circulate. Therefore, the retained electronic record could not meet anymore the requirements of an electronic transferable record.

75. It was explained that different retention requirements could be contained in various pieces of legislation and that each law reflected a different goal. For instance, special retention and archival requirements could be set forth for tax and accounting purposes, whereas, it was noted, draft paragraph 1 aimed at providing general retention requirements for evidentiary purposes. It was added that such general rule on retention requirements could be found in the law on electronic transactions and that therefore draft paragraph 1 was redundant.

76. It was said that draft paragraph 2 specified the principle that the requirements set forth in draft paragraph 1 could be fulfilled directly or with the assistance of a third party. However, it was added, because paragraph 1 focused on a requirement and not a party, paragraph 2 was unnecessary.

77. After discussion, the Working Group decided to delete draft article 27.

Third-party service providers

78. With respect to draft section D relating to third-party service providers, it was indicated that its general approach was over-regulatory. It was added that the enabling scope of the draft provisions was not compatible with regulatory concerns, which

should be addressed in other legislation, and that it was not appropriate for the draft provisions to contain any regulatory sanction. It was added that the subject dealt with in draft articles 28 and 29 could be addressed in explanatory material or a guidance document. It was further noted that developments in technology and business practice recommended a flexible approach. It was stressed that the draft provisions should leave freedom of choice of third-party service providers as well as of the type of services requested and their reliability level.

79. Moreover, it was noted that the draft definition of "third-party service providers" contained in draft article 3 encompassed a large number of third parties involved in the use of electronic transferable records, such as lawyers and accountants, and that those third parties would not be in a position to meet the requirements set forth in draft articles 28 and 29. It was further indicated that the relevant notion of "third-party service providers" seemed to focus on providers of technology used for the management of electronic transferable records. It was suggested that that draft definition should be revised accordingly.

80. However, the view was also expressed that one goal of the draft provisions was to increase confidence in the use of electronic transferable records, and that setting forth minimum requirements for providers of services related to the use of those records would have a positive impact on building that confidence. It was added that providing guidance, including through guidelines, on the matters dealt with by draft articles 28 and 29 would increase legal harmonisation, which was also a goal of the draft provisions. It was added that, lacking a regulation of minimum legal standards, a possibility existed, especially in oligopolistic markets, that the freedom of contract of users would be limited by the offer of similar contractual conditions by third-party service providers.

81. A suggestion was made that voluntary compliance schemes for the provision of services, whose adoption would give rise to legal presumptions, could offer a solution to some of the concerns expressed. However, it was added, the Working Group was not the right forum for that discussion given the enabling nature of the draft provisions.

82. After discussion, the Working Group decided to delete draft articles 28 and 29 as well as the definition of "third-party service provider" contained in draft article 3 and to place the material related to the subject of third-party providers in explanatory material or a guidance document.

"Control" and "Possession"

83. Broad agreement was expressed that control was the functional equivalent of possession. However, it was noted that the different understandings of possession and control in various legal systems created significant difficulty in defining control. One proposal to overcome that difficulty was to define control as the functional equivalent of possession and to leave the definition of "possession" to national law.

84. The Working Group agreed that open questions with regard to control were whether there was a need for: (i) a functional equivalence rule defining possession as control as in draft article 17; (ii) a definition of control or whether that definition was already contained in draft article 17; (iii) a definition of possession or whether that definition could be left to national law; and (iv) a list of requirements for a system concerning the security of transfer of an electronic transferable record.

85. A proposal was made to address concerns expressed with respect to avoiding multiple claims for performance:

> "Article 10. Paper-based transferable documents
>
> 1. Where the law requires a paper-based transferable document, or provides consequences for its absence, that requirement is met by an electronic record, provided that it replicates all the functions of a transferable document.
>
> 2. If a reliable method can be employed to identify an electronic record as an electronic transferable record that contains authoritative information

constituting an electronic transferable record, and that always retains its integrity, that electronic record may be deemed to have replicated all the functions of a transferable document.

3. If a reliable method can be employed to identify a person as one who has control of an electronic transferable record, that method is also deemed to have met the requirements of paragraph 1 of this article.

4. A person in control refers to a person reliably identified as one to whom an electronic transferable record is issued or transferred."

86. It was explained that the purpose of that proposal was to avoid multiple claims by combining the two prevailing approaches used to achieve that goal, namely "singularity" and "control". It was further explained that the "singularity" approach required the identification of an electronic record as the electronic transferable record that contained authoritative information through the use of a reliable method, while the "control" approach focused on the use of a reliable method to identify the person in control of the electronic transferable record. It was added that draft article 17 would need to be redrafted if the proposal was adopted. A comment was made that the "singularity" approach could apply in particular to token-based systems while the "control" approach could apply in particular to registry-based systems.

87. It was suggested to place paragraphs 1 and 2 of the proposal in draft article 10. It was also proposed that the reference to authoritative information in draft article 10, subparagraph 1(a), that was deleted according to an earlier decision (see paragraph 26 above) should be reinstated. It was noted that the concept of "integrity" contained in paragraph 2 of the proposal was already included in draft article 10, subparagraph 1(c).

88. It was proposed to discuss the definition of "electronic transferable record" contained in draft article 3 in conjunction with draft article 10. Concerns were expressed on the meaning of "all functions" of an electronic transferable record in paragraph 1 and of "authoritative information" in paragraph 2 of the proposal. With regard to the words "all functions", it was noted that those functions would be set out in substantive law.

89. In response, it was explained that, in order to achieve functional equivalence, "all functions" of a paper-based transferable document or instrument needed to be fulfilled. It was also said that the words "authoritative information" had been included to ensure singularity of the electronic transferable record. It was suggested that the term could be further explained in explanatory material.

90. The view was reiterated that a distinction should be drawn between control and the object of control (see paragraph 22 above) and that the proposal addressed that concern in so far as it contained a reference to "authoritative information". It was further said that only control of the electronic record containing authoritative information would provide the functional equivalent of possession of the paper-based transferable document or instrument, as both elements were necessary (see paragraph 21 above). Reference was made to Section 7-106 of the Uniform Commercial Code as an example of legislation endorsing that approach. In response, it was clarified that Section 7-106 of the Uniform Commercial Code only provided for "authoritative copy" as a safe harbour provision where a token system was used, and did not apply to a registry system. It was indicated that, while there was no common understanding of the term "control", the approach taken in the proposal was acceptable in principle.

91. A proposal was made to include elements of paragraphs 3 and 4 of the proposal in draft article 17, paragraph 1(a) as follows:

"A method is used to establish exclusive control of that electronic transferable record by a person and to reliably [identify] [establish] that person as the person in control."

92. It was also proposed to place draft articles 10 and 17 consecutively.

93. A concern was expressed that the word "exclusive" might lead to confusion, since control by definition was exclusive. In response, it was said that the notion of "exclusive" control might be obvious to some, but that the word "exclusive" could provide useful clarification. It was further stated that in the electronic environment there could be concurrent control of an electronic record by more than one person, and that therefore the word "exclusive" would provide clarity if draft article 17, paragraph 1(a), was intended to require exclusive control. Alternatively, it was added, clarification could be included in explanatory materials. In addition, it was said that that proposal would render paragraph 2 of draft article 17 redundant.

94. The Working Group agreed to retain the proposed text of draft article 17, paragraph 1(a), included in paragraph 91 above, and to delete draft article 17, paragraph 2.

Draft article 3. Definition of electronic transferable record

95. It was suggested that the definition of electronic transferable record should indicate that the electronic record that complied with the requirements set forth in draft article 10 was an electronic transferable record. In response, it was noted that draft article 10 dealt with the use of an electronic transferable record and that mere reference to that article would not suffice to define an electronic transferable record.

96. The view was also expressed that a definition of electronic transferable record would result from the joint reading of the definition of paper-based transferable document or instrument and of draft article 10 establishing functional equivalence between an electronic transferable record and a paper-based transferable document or instrument.

97. In response, it was said that a definition of electronic transferable record was needed for those electronic transferable records existing only in electronic form. In turn, it was recalled that current deliberations of the Working Group were limited to electronic transferable records that were functional equivalents of paper-based transferable documents or instruments, and that electronic transferable records existing only in electronic form would be discussed only at a later stage.

98. It was suggested that the definition of electronic transferable record should indicate that that record should contain the same information as its paper-based equivalent. It was added that draft article 15, on information requirements, was insufficient to that end.

Draft article 10. [Paper-based transferable document or instrument] [Operative transferable record] [Electronic transferable record]

99. A proposal was made to recast draft article 10, paragraph 1 as follows:

> "1. Where the law requires a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by an electronic record if:
>
> (a) The electronic record contains the information that would be required to be contained in an equivalent paper-based transferable document or instrument; and
>
> (b) A method is employed:
>
> (i) That is as reliable as appropriate to identify that electronic record as the authoritative record constituting the electronic transferable record [and to prevent its unauthorized replication];
>
> (ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and
>
> (iii) That is as reliable as appropriate, to retain the integrity of the electronic transferable record".

100. The following draft definition of electronic transferable record was also suggested, subject to further refinement in view of the discussions on draft article 10:

> "An electronic transferable record is an electronic record that contains all of the information that would make a paper-based transferable document or instrument effective and that complies with the requirements of article 10".

"Authoritative"

101. It was observed that the term "authoritative" was used in national law, for instance in Section 7-106 of the Uniform Commercial Code (see paragraph 90 above). However, it was added, that term required further clarification as different meanings had been attributed to it during the deliberations of the Working Group in light of legal and linguistic differences.

102. It was explained that the term "authoritative" referred to the identification of the operative record by the system. It was further explained that that term did not refer to the uniqueness of the information contained in the authoritative record, or to the "authorizing" function of the authoritative record.

103. In response, it was noted that the term "operative" was also unclear. It was suggested that the notion of control could be used instead. Alternatively, it was suggested that the term "authoritative" should be deleted and that reference to identification of the electronic transferable record as such should be inserted.

104. After discussion, the Working Group decided to retain the term "authoritative" pending further clarification of its meaning, including in explanatory materials, or its substitution with a more adequate word.

"Unauthorized replication"

105. The concern was expressed that the inclusion of the words "[and to prevent its unauthorized replication]" could be read as permitting the replication, albeit authorized, of the electronic transferable record, thus allowing for the circulation of several electronic transferable records and possibly exposing the obligor to multiple claims for performance.

106. It was explained that the notion of electronic transferable record presupposed the existence of only one electronic transferable record containing authoritative information, and that therefore any authorized reproduction could result only in non-transferable electronic records.

107. In response, it was noted that it was impossible to completely prevent replication of electronic records. It was also noted that other draft provisions aimed at preventing multiple claims. Therefore, it was suggested that a provision aimed at preventing unauthorized replication was not useful and posed practical challenges.

108. The Working Group agreed to delete the words "[and to prevent its unauthorized replication]".

V. Other business

109. The Working Group was informed about the possible topics for its future work submitted for the consideration of the Commission at its forthcoming forty-eighth session. In particular, reference was made to the note on possible future work on mobile commerce and mobile payments submitted by the Government of Colombia (A/CN.9/WG.IV/WP.133). That proposal explained that mobile commerce and mobile payments were increasingly in use in emerging economies and that the development of adequate legal rules could promote both electronic commerce and financial inclusion.

110. The Working Group was also informed that additional proposals submitted to the Commission included possible future work on identity management (A/CN.9/854) and on cloud computing (A/CN.9/823).

D. Note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.132 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[1]

2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the final form of its work (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as contained in document A/CN.9/WG.IV/WP.124 and Add.1.

5. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. The Working Group focused its discussion on concepts of original, uniqueness, and integrity of an electronic transferable record.

6. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was suggested that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30). Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/828, paras. 20-111).

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

II. Draft provisions on electronic transferable records

A. General

"***Draft article 1. Scope of application***

"1. This Law applies to electronic transferable records.

"2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a paper-based transferable document or instrument.

"[3. This Law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]"

Remarks

7. Draft article 1 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).

8. Draft paragraph 2 sets forth the principle that the draft Model Law does not affect substantive law applicable to paper-based transferable documents or instruments and to their electronic equivalents. Accordingly, it enables the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/797, para. 65). It also allows changing the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case ("blank endorsement") when permissible under substantive law (A/CN.9/828, para. 82).

9. Draft paragraph 3 aims at allowing the application of the draft provisions also to electronic transferable records that exist only in an electronic environment without interfering with their substantive law. Hence, paragraph 3 would not be necessary in jurisdictions where those electronic transferable records do not exist (A/CN.9/797, para. 17). The Working Group may wish to review this provision according to its decision on work priorities (A/CN.9/828, para. 30).

"***Draft article 2. Exclusions***

"1. This Law does not override any rule of law applicable to consumer protection.

"2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.

"3. [This Law does not apply to bills of exchange, promissory notes and cheques.]"

Remarks

10. Draft article 2 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20). The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

11. The Working Group may wish to discuss whether draft article 2, paragraph 1, should be retained in light of the fact that the draft Model Law does not affect substantive law, as set forth in draft article 1, paragraph 2.

12. As a reference, the Working Group may wish to compare the language used in the "Rome II" Regulation,[2] to exclude from the application of the Regulation "non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such

[2] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L 199, 31/7/2007, pp. 40-49.

other negotiable instruments arise out of their negotiable character". Therefore, it is understood that "other transferable documents, such as investment securities and loans"[3] fall within the scope of the Regulation. However, the ultimate result may depend on domestic law, as, for instance, in certain jurisdictions shares and bonds are considered negotiable instruments and would therefore be excluded from the scope of the Regulation.

13. Paragraph 3 reflects the view that certain paper-based transferable documents or instruments should be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

14. The Working Group may wish to consider whether paragraph 3 should be retained in the draft Model Law to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact that model law.

"***Draft article 3. Definitions***

"For the purposes of this Law:"

Remarks

15. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition. The Working Group may wish to review the draft definitions once the draft articles of the Model Law had been fully considered and the use of the defined terms ascertained (A/CN.9/828, para. 66).

16. All references to "holder" in the draft provisions have been deleted and replaced with "person in control" (A/CN.9/804, para. 85). The Working Group may wish to clarify in draft article 3 that a "person" may either be a natural or a legal person.

"*electronic transferable record*" means [an electronic record] that entitles the person in control to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

"*paper-based transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.

Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.

Remarks

17. The definitions of "electronic transferable record" and "paper-based transferable document or instrument" reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). These definitions do not aim at affecting the fact that substantive law shall determine whether the person in control is the rightful person in control as well as the substantive rights of the person in control.

[3] See Philip R. Wood, Conflict of Laws and International Finance (The Law and Practice of International Finance, Vol. 6), 2007, sub 11-043.

18. The definition of "electronic transferable record" does not aim at describing all the functions possibly related to the use of an electronic transferable record. For instance, an electronic transferable record may have an evidentiary value; however, the ability of that record to discharge that function will be assessed under law other than the draft provisions.

19. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under either of these two definitions and that the draft provisions should only focus on "transferable" documents (A/CN.9/797, paras. 27-28).

20. The Working Group may wish to consider whether the term "[indicated]" in square brackets in both draft definitions is appropriate or whether other terms might be used such as "represented by", "incorporated", "specified" or "contained" (A/CN.9/797, para. 22).

21. The Working Group may wish to take into account the definition of "electronic record" when considering the definition of "electronic transferable record".

22. The Working Group may wish to consider deleting the definition of paper-based transferable document or instrument as it concerns substantive law.

23. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, which is inspired by article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention"), should be included in the definition of "paper-based transferable document or instrument" or in explanatory material (A/CN.9/768, para. 34, and A/CN.9/797, paras. 25-26), bearing also in mind draft article 2, paragraph 3. The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

> "*electronic record*" means information generated, communicated, received or stored by electronic means [, including, where appropriate, all information logically associated or otherwise linked [together] [thereto] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently]].

Remarks

24. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996) and in the Electronic Communications Convention. The bracketed text aims at highlighting the fact that information may be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). That bracketed text is also meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43). The Working Group may also wish to recall its discussion of "electronic record" with respect to draft article 10 (A/CN.9/828, para. 31).

> "*issuer*" means a person that issues, directly or with the assistance of a third party, an electronic transferable record.

Remarks

25. The Working Group may wish to consider whether to retain the definition of "issuer" in light of the deletion of a draft provision on issuance (A/CN.9/797, paras. 64-67). The term "issuer" appears in draft article 27 on retention and may be relevant for other provisions such as draft articles 12, on time and place of dispatch and receipt, 23 on change of medium and 24 on division and consolidation.

26. The words ", directly or with the assistance of a third party," aim at clarifying that when an electronic transferable record is issued by a third-party service provider

upon the issuer's request, the third-party service provider is not considered an issuer under the draft provisions (A/CN.9/768, para. 33).

["*control*" of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].]

Remarks

27. The draft definition of "control" has been placed in square brackets further to a decision of the Working Group at its fiftieth session made in conjunction with its consideration of draft article 17 on possession (A/CN.9/828, paras. 66-67).

"*transfer*" of an electronic transferable record means the transfer of control over an electronic transferable record.

Remarks

28. In considering the draft definition, the Working Group may wish to note its decisions to delete a draft provision on transfer (A/CN.9/828, para. 84) as well as a draft rule conveying that transfer of control over an electronic transferable record was necessary to transfer that electronic transferable record (A/CN.9/804, paras. 82 and 85).

"*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 21.

Remarks

29. The Working Group may wish to consider whether to retain this definition in light of draft article 21 on amendment and of the remarks to that draft article. The term "amendment" occurs only in that draft article.

"*performance of obligation*" means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

Remarks

30. The Working Group may wish to consider whether to retain this definition in light of its substantive law implications. That draft definition refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22). The term "performance of obligations" appears in the definitions of "electronic transferable record" and of "paper-based transferable document or instrument".

"*obligor*" means the person [indicated] in a paper-based transferable document or instrument or in an electronic transferable record as having the obligation to perform [the obligation contained in that document, instrument or record].

Remarks

31. The definition of "obligor" has been reviewed in order to further clarify that it has only descriptive value and that substantive law shall determine who the obligor is. The Working Group may wish to consider whether the definition of "obligor" should be retained in light of the fact that the notion may be defined under substantive law.

32. The term "obligor" appears in draft articles 19, 23 and 28, respectively on presentation, change of medium, and conduct of a third-party service provider. The Working Group may wish to consider the continued relevance of that draft definition in light of the final form of those articles.

33. If the definition of "obligor" is retained, the Working Group may wish to consider whether the term "[indicated]" is appropriate or whether other terms might be used (see also above, para. 20).

"*replacement*" means substitution of a paper-based transferable document or instrument with an electronic transferable record or [vice versa] [conversely].

Remarks

34. The Working Group may wish to consider whether the draft definition should be retained in light of draft article 23 on change of medium. In that case, the Working Group may wish to discuss whether the draft definition should refer only to instances falling under the scope of draft article 23, or whether it should be broadened to include instances where an electronic transferable record was reissued to substitute for another electronic transferable record according to draft article 22 (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

"*third-party service provider*" means a third party providing services related to [the use of] electronic transferable records [in accordance with articles 28 and 29]."

35. The words "[in accordance with articles 28 and 29]" were retained pending deliberations of the Working Group on those draft provisions.

36. The Working Group may wish to consider whether the words [the use of] should be deleted to ensure consistency with the definition of "certificate service provider" contained in article 2(e) of the UNCITRAL Model Law on Electronic Signatures (2001).

"***Draft article 4. Interpretation***

"1. This Law is derived from […] of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].

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

Remarks

37. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions should be interpreted with reference to their international origin in order to facilitate uniform interpretation (A/CN.9/768, para. 35). The square bracketed text in paragraph 1 would depend on the final form of the draft provisions and the paragraph itself would need to be revised accordingly.

38. The notion of "general principles" contained in paragraph 2 has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that notion that has been most interpreted by case law.

39. The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) lists several general principles relevant to article 7 of the CISG according to case law. Those general principles may be contained in specific provisions of the CISG and applied in other cases falling under the scope of the CISG.

40. However, not all the general principles that have been identified in the CISG gather the same level of support in being recognized as such. Moreover, determination of the content and operation of those general principles takes place progressively. Such progressive determination assists in ensuring flexibility in the interpretation of the CISG and in adapting the CISG to evolving commercial practices and business needs.

41. The notion of "general principles" contained in draft article 4, paragraph 2, of the draft provisions refers to the general principles of electronic transactions (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the fundamental principles of non-discrimination of electronic communications, technological neutrality and functional equivalence are general principles underlying the draft provisions. Other general principles might be identified as the work of the Working Group makes progress.

42. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant to define the notion of general principles contained in the draft provisions. In that respect, the Working Group may wish to consider whether a reference to good faith should be retained, also in light of the fact that it is contained in several other UNCITRAL texts, including those on electronic commerce.

"***Draft article 5. Party autonomy [and privity of contract]***

"1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 1, 2, 4, 5, paragraph 2, 6, 7, […], 28 and 29].

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

43. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32). It is suggested that such identification should be carried out at a later stage of preparation of the draft provisions, pending, in particular, discussion on the provisions relating to third-party service providers.

"***Draft article 6. Information requirements***

"Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

44. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

B. Provisions on electronic transactions

45. The Working Group at its forty-eighth session decided to retain draft articles 7-9 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft provisions as well as the content of those articles.

"***Draft article 7. Legal recognition of an electronic transferable record***

"An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form."

Remarks

46. Draft article 7 sets forth the principle of non-discrimination. At its forty-ninth session, the Working Group decided to retain draft article 7 in its current form (A/CN.9/804, para. 17, see also A/CN.9/768, para. 39).

"***Draft article 8. Writing***

"Where the law requires that information should be in writing or provides consequences for the absence of a writing, that requirement is met with respect

to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."

Remarks

47. Draft article 8 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, paras. 18-19). It establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records (A/CN.9/797, para. 37). Draft article 8 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (ibid.). The general rule on functional equivalence between electronic and written form should be contained in the law on electronic transactions (A/CN.9/797, para. 38).

48. At the forty-ninth session, it was suggested that draft article 8 might not be necessary as the fulfilment of the functional equivalence of the "writing" requirement was implied in the definition of "electronic transferable record" in draft article 3. In response, it was stated that a rule on the "writing" requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions (A/CN.9/804, para. 18). The Working Group may wish to consider the desirability of maintaining draft article 8 in light of draft articles 10 and 11.

49. In case the draft provisions were to be applicable to electronic transferable records with no paper-based equivalent (see para. 9 above), the Working Group may wish to confirm that the law governing those records should set forth the same requirements contained in draft article 8, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

"***Draft article 9. Signature***

"Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met with respect to an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic record was generated, in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."

Remarks

50. Draft article 9 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, para. 20). It establishes the requirements for the functional equivalence of "signature" (ibid.) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement) (A/CN.9/797, para. 46). It follows closely the text of article 9, paragraph 3, of the Electronic Communications Convention.

51. Reference in draft article 9, paragraph (b)(i), to "as reliable as appropriate" follows the approach adopted in article 9, paragraph 3, of the Electronic Communications Convention. This approach to a method "as reliable as appropriate" is distinct from the references contained in other draft articles to a "reliable method". It may also be distinct from the reference to a method "as reliable as appropriate" contained in draft article 17 since that draft article deals with functional equivalence of possession, which is not discussed in the Electronic Communications Convention.

52. The explanatory note to the Electronic Communications Convention provides guidance on the content and operation of that notion of "reliability" in the context of

article 9, paragraph 3, of that Convention.[4] The Working Group may wish to confirm that the guidance provided in that explanatory note would be appropriate in interpreting draft article 9, subparagraph (b)(i).

53. In that respect, the Working Group may also wish to clarify whether the general reliability standard contained in draft article 11 would apply also to draft article 9, subparagraph (b)(i) (A/CN.9/804, para. 20).

54. Another option would be to include in draft article 9 text similar to the requirements set forth in article 6, paragraph 3, of the Model Law on Electronic Signatures, thus providing a specific reliability standard applicable only to draft article 9, subparagraph (b)(i). It should, however, be noted that the Working Group had already agreed that such "two-tier" approach would not be adopted in the draft provisions (A/CN.9/797, para. 40).

Remarks on "original"

55. After noting that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47) and that the main purpose of a functional equivalence rule for that notion in the context of electronic transferable records should be the prevention of multiple claims (A/CN.9/804, para. 21), the Working Group agreed that there was no need to include a functional equivalence rule for "original" in the draft provisions (A/CN.9/804, para. 40). It was explained that the goal of avoiding multiple claims in the context of electronic transferable records could be achieved through the notion of "control". It was further explained that the notion of "control" could identify both the person entitled to performance and the object of control (A/CN.9/804, para. 39).

C. Use of electronic transferable records

"***Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]***

"1. Where the law requires the use of a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by the use of an electronic record if a method is employed:

(a) That is as reliable as appropriate, [to identify that electronic record as the electronic transferable record] [to identify that electronic record as the electronic record containing the authoritative information constituting the electronic transferable record] and to prevent the unauthorized replication of that electronic transferable record;

(b) To render that electronic record capable of being subject to control during its life cycle; and

(c) That is as reliable as appropriate, to retain the integrity of the electronic transferable record.

"2. The criteria for assessing integrity shall be whether information contained in the electronic transferable record, including any [legally relevant] [authorized] change that arises [throughout its life cycle] [from its creation until it ceases to have any effect or validity], has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display. The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

[4] United Nations, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007, paras. 161-164.

Remarks

56. Draft article 10 aims to offer a functional equivalence rule for the use of paper-based transferable documents or instruments by setting forth the requirements to be met by an electronic record. The Working Group agreed to introduce draft article 10 in light of its discussions on the notion of uniqueness and its decision to delete a rule on uniqueness (A/CN.9/804, paras. 71 and 74). It was added that resorting to the notion of "control" would make it possible not to refer to the notion of "uniqueness", which posed technical challenges (A/CN.9/804, para. 38).

57. The Working Group agreed that reference to the definition of "electronic record" would suffice to provide for cases when, as it may happen in certain registry systems, there might be data elements that, taken together, provided the information constituting the electronic transferable record, with no discrete record constituting the electronic transferable record (A/CN.9/828, para. 31).

58. Subparagraph 1(a) reflects the Working Group's discussion on the necessity to identify an electronic transferable record as the operative or authoritative electronic record (A/CN.9/828, paras. 32-35). The Working Group may wish to consider whether the definition of "electronic transferable record" in draft article 3 would suffice to ensure that an electronic transferable record produced legal effects and therefore render the qualification of an electronic transferable record as "authoritative" unnecessary.

59. Subparagraph 1(b) reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 55). The draft provision reflects the view that an electronic transferable record might not necessarily be subject to control, but should be capable of being controlled during its entire life cycle, particularly in order to allow for its transfer (A/CN.9/804, para. 61). This could happen, for instance, when a token-based electronic transferable record is lost.

60. At its fiftieth session, the Working Group agreed to insert a provision on the assessment of the reliability standard for the notion of integrity (A/CN.9/828, para. 49). That provision, which has been included as paragraph 2, indicates that an electronic transferable record retains integrity when any set of information related to legally relevant changes during its life cycle (as opposed to changes of purely technical nature) remains complete and unaltered (A/CN.9/804, para. 29). It is inspired by article 8, paragraph 3, of the Model Law on Electronic Commerce.

61. The Working Group may wish to consider whether the words [legally relevant] [authorized] should be retained in light of its discussions on the desirability to record all or only selected changes, and on the difference between authorized and legitimate changes (A/CN.9/828, paras. 42-44; A/CN.9/804, paras. 30-32).

62. The words "[from its creation until it ceases to have any effect or validity]" are used in article 1(21) of the Rotterdam Rules (A/CN.9/828, para. 56).

63. At the Working Group's fiftieth session, it was said that subparagraph 1(a) should be assessed against general reliability standards (A/CN.9/828, para. 37) and that subparagraph 1(b) was not subject to a reliability test as draft article 17 provided the reliability standard to assess the method used to establish control (ibid., para. 38). The Working Group may wish to consider whether additional guidance is needed on the reliability standards applicable to subparagraphs 1(a) and (b).

64. The Working Group may wish to consider whether draft article 10 should be placed closer to draft article 18 relating to "control" (A/CN.9/804, para. 75).

"***Draft article 11. General reliability standard***

"1. The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.

"2. In determining whether, or to what extent, a method is reliable [for the purposes of articles 10, 17 and …], regard may be had to the following factors:

(a) Level of assurance of data integrity;

(b) Ability to prevent unauthorized access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(f) [Any agreement among the parties;]

(g) Any other relevant factor."

Remarks

65. Draft article 11 aims at providing a general reliability standard.

66. At the Working Group's forty-ninth session, different views were expressed with respect to the desirability of inserting such provision.

67. On the one hand, it was indicated that the draft provisions should provide general guidance on the meaning of reliability and set out the criteria for meeting that standard. It was added that, while party autonomy could suffice to establish reliability standards in closed systems, there still was a need for the draft provisions to set out reliability standards applicable to open systems. It was further mentioned that if a general reliability standard were to be included, it should be drafted in a manner mindful of technological neutrality (A/CN.9/804, para. 43).

68. Moreover, the inclusion of additional factors to assess reliability was suggested. Those factors related to: quality of staff; sufficient financial resources and liability insurance; existence of a notification procedure for security breaches and of reliable audit trails (A/CN.9/804, paras. 44-45).

69. However, at that session the view was also expressed that the existing and newly-suggested reliability factors were too detailed and that the provision was regulatory in nature. It was added that the adoption of such detailed requirements could impose excessive costs on business and ultimately hamper electronic commerce. It was further noted that those requirements could lead to increased litigation based on complex technical matters. It was suggested that a reference to reliable methods based on internationally accepted standards and practices should instead be inserted in the draft provisions (A/CN.9/804, para. 46).

70. In that same line, it was stated that the presence of a general reliability standard could hamper use of electronic transferable records as legal consequences of failure to meet those standards were not clear. It was further indicated that caution should be exercised so as not to make the draft provisions untenable in practice. It was also noted that there was no need for a general reliability standard as each draft article containing a reliability standard should include in itself a provision specific to that context (A/CN.9/804, para. 42).

71. In conclusion, the Working Group agreed to further consider draft article 11 as a possible general rule on system reliability and in connection with provisions relating to third-party service providers. The Working Group also agreed to consider the adoption of specific standards for each draft provision referring to a reliable method (A/CN.9/804, para. 49).

72. At its fiftieth session, the Working Group agreed to incorporate in draft article 11 text providing general guidance on the reliability standard (A/CN.9/828, paras. 47 and 49). That language, inspired also by article 17, paragraph 4, of the Model Law on Electronic Commerce, has been inserted as paragraph 1 of draft article 11.

73. Draft subparagraph 2(f) was inserted to highlight the relevance of any agreement of the parties when assessing reliability.

74. The Working Group may wish to discuss whether draft article 11, subparagraph 2(a), should refer to data integrity in the system, to integrity of the electronic transferable record or to both, in light also of draft article 10.

75. The Working Group may also wish to discuss whether draft article 11, subparagraph 2(b), should explicitly refer to unauthorized access and use of the system or of the method employed to establish control, in light also of draft article 17.

76. The following draft articles contain a specific standard for the assessment of reliability: draft article 9 on signatures, draft article 10, with respect to integrity, and draft article 17 on possession and control. The Working Group may wish to confirm that the general reliability standard contained in draft article 11 would also apply to those draft articles.

77. Draft articles 10, with respect to identification of the electronic record as the electronic transferable record and to prevention of the unauthorized replication of that electronic transferable record, 21 on amendment, 24 on division and consolidation, 25 on termination and 26 on use for security right purposes refer to the use of a reliable method. The Working Group may wish to confirm whether draft article 11 would suffice to assess the reliability of the various methods referred to in those draft articles. In that respect, the Working Group may also wish to clarify if additional guidance could be obtained from the standards contained in draft article 17 on functional equivalence of possession.

(A/CN.9/WG.IV/WP.132/Add.1) (Original: English)
Note by the Secretariat on draft provisions on electronic transferable records

ADDENDUM

Contents

II. Draft provisions on electronic transferable records (*continued*)

C. Use of electronic transferable records (Articles 12-27)

"***Draft article 12. Time and place of dispatch and receipt of electronic transferable records***

["1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

"2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

"3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

"4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article.]"

Remarks

1. At the Working Group's forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61; see also A/CN.9/768, paras. 68-69). The Working Group may wish to consider whether draft article 12, based on a provision designed for the exchange of electronic communications, could adequately provide for electronic transferable records.

2. Moreover, the Working Group may wish to clarify which are the substantive law requirements with respect to the time and place of dispatch and receipt of a paper-

based transferable document or instrument and what legal consequences are attached thereto.

3. In particular, the Working Group may wish to consider how draft article 12 could operate in registry systems where an electronic transferable record might circulate without being sent to or received at an electronic address. Existing practice with respect to registry systems seems to rely on time-stamping services to record the availability of information in that system. In turn, the availability of information in the system may be the legally relevant moment according to substantive law or contractual agreement, regardless of that information being communicated.[1] On the other hand, practice based on substantive law may allow for the parties' agreement on relevant time, which would then not correspond to the moment when the event is recorded in the system.

4. The Working Group may also wish to consider whether draft article 12 would adequately address the matter in case of use of a token-based system. In that respect, the Working Group may also wish to specifically consider whether, in case of transfer of the electronic transferable record by transmission of its storage medium (e.g., USB key or smart card), the use of an electronic medium would pose specific challenges or if the rule contained in substantive law would apply.

5. An alternative draft of article 12 submitted for the consideration of the Working Group aims at enabling in an electronic environment the various possible options related to information on date and time.

> "***Draft article 12. Indication of time and place in electronic transferable records***
>
> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, a reliable method shall be employed to indicate that time or place with respect to an electronic transferable record."]

6. The Working Group may wish to consider replacing the words "originator" and "addressee" with the word "person in control" or other appropriate term. Alternatively, the Working Group may wish to consider defining the terms "originator", "addressee" and "electronic address". Moreover, the Working Group may wish to discuss the relationship between "originator", "issuer" and "transferor".

7. Draft articles 12 (alternative draft), 14, 20, 21, 22, 24, 25 and 26 refer to instances in which the law does not require, but permits a certain action, or may alternatively require or permit that action. At its fiftieth session, the Working Group agreed that the language used in those provisions should be revised to adequately accommodate functional equivalence rules both when the law requires a certain action and when the law permits it (A/CN.9/828, para. 80). The issue seems to arise from the fact that functional equivalence rules aim at meeting a legal requirement and are drafted accordingly.

8. One view is that where the law permits an action, that permission is still subject to certain requirements. Under that view, the language used to refer to a requirement to be met would apply in both instances, i.e. when the law requires an action and when the law permits an action subject to certain requirements. In that respect, reference to the words "or whether the law simply provides consequences" (contained, for instance, in article 8, paragraph 2, of the UNCITRAL Model Law on Electronic Commerce — see also draft articles 9, 17 and 19 of the draft Model Law) could also

[1] Recommendation 11 of the UNCITRAL Guide on the Implementation of a Security Rights Registry states that the registration of a notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

be relevant. That view is supported by legislation enacting UNCITRAL texts.[2] Should the Working Group agree with that view, it may wish to consider inserting appropriate guidance in the materials illustrating the draft provisions.

9. An alternative draft could be based on the use of "may" to stress the enabling nature of the rule when introducing the requirements for functional equivalence. Under that approach, the alternative text of draft article 12 could read as follows:

> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, time or place may be indicated in an electronic transferable record if a reliable method is employed."]

An alternative text of draft article 21 based on this approach is also provided (see below, para. 41).

10. Another drafting option could follow the approach taken in draft article 14, paragraph 1, and use the words "this may be achieved". Such approach could offer the advantage of stressing the enabling function of the provision. Under that approach, the alternative text of draft article 12 could read as follows:

> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, this may be achieved in an electronic transferable record if a reliable method is employed."]

An alternative text of draft article 21 based on this approach is also provided (see below, para. 42).

> "***Draft article 13. Consent to use an electronic transferable record***
>
> "1. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.
>
> "2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

11. Draft article 13 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

> ["***Draft article 14. [Issuance of] multiple originals***
>
> "1. Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with respect to electronic transferable records by [issuance of multiple [operative] electronic records].
>
> ["2. The total number of multiple [operative] electronic records issued shall be indicated in those multiple records.]
>
> ["3. Where multiple [operative] electronic records have been issued, any requirement for presentation of more than one original of a paper-based transferable document or instrument is met by the presentation of one [operative] electronic record[, unless the parties have agreed otherwise].]"]

[2] For example, Section 18 of the Electronic Transaction Act of South Africa, 2002, on notarization, acknowledgement and certification, reads:
"(2) Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a print-out certified to be a true reproduction of the document or information.
(3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature."

Remarks

12. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). It aims at enabling the possibility of issuing multiple electronic records, each controlled by a different entity, if so wished. However, it should be noted that some of the functions pursued with the issuance of multiple paper-based transferable documents or instruments might be achieved in an electronic environment, especially if based on a registry system, by attributing selectively control on one electronic transferable record to multiple entities.

13. The possibility of issuing multiple originals of a paper-based transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49). However, commentators on maritime transport law do not recommend this practice, unless absolutely commercially necessary, due to the possibility of multiple claims for the same performance based on each original. On the other hand, existing practice foresees the use of multiple electronic bills of lading.

14. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules") specifically allows for the issuance of multiple originals of negotiable transport documents. In particular, its article 47, subparagraph 1(c), sets forth that: "If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity". This rule, which applies to paper-based transport documents, reflects current practice. Article 47, subparagraph 1(c), of the Rotterdam Rules also deals with negotiable electronic transport records, but does not contain any provision for multiple negotiable electronic transport records.

15. Rule 4.15 of the International Standby Practices — ISP 98, dealing with "Original, Copy and Multiple Documents" allows for presentation of an electronic record, which "is deemed to be an 'original'", but does not contain any provision on presentation of multiple "original" electronic records.

16. Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP"), dealing with "Originals and Copies", sets forth that: "Any requirement of the UCP or a eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record". The commentary to that article explains that the concept of a full set of bills of lading is anachronistic in an electronic environment and would be satisfied by the presentment of a required electronic record "unless the credit expressly provided otherwise with sufficient specificity to indicate what was wanted".

17. Paragraph 2 of draft article 14 contains a provision inspired by article 36, subparagraph 2(d), of the Rotterdam Rules and aims at informing all concerned parties of the number of operative electronic records in circulation. The Working Group may wish to consider whether such rule would be desirable in light of the specific features of electronic transferable records, or if such requirement should be satisfied only if already set forth in substantive law.

18. Paragraph 3 of draft article 14 contains a provision inspired by article e8 eUCP. The Working Group may wish to consider whether that paragraph should be retained and, if so, whether it should be placed in draft article 19 on presentation. The Working Group may also wish to consider whether the words "[, unless the parties have agreed otherwise]" should be retained to stress the possibility for the parties to agree on different modalities, or whether draft article 5 on party autonomy, applicable also to draft article 14, paragraph 3, would suffice.

19. The Working Group may wish to consider whether a provision dealing with the co-existence of multiple originals issued on different media should be inserted in the draft provisions.

20. Draft articles 14 and 15 are the only draft provisions that explicitly refer to issuance (see A/CN.9/797, paras. 64-69).

> "***Draft article 15. Substantive information requirements of electronic transferable records***
>
> "Nothing in this Law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument."

Remarks

21. Draft article 15 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record than that required for a corresponding paper-based transferable document or instrument.

22. The Working Group may wish to clarify whether the information requirement contained in draft article 23(1)(b) (and the corresponding draft article 23(2)(b)), which aims at ensuring the perduring availability of information in case of change of medium, represents an exception to this rule.

> "***Draft article 16. Additional information in electronic transferable records***
>
> "Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument."

Remarks

23. Draft article 16 states that an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument. In particular, some information could be included in an electronic transferable record due to its dynamic nature but not in a paper-based document or instrument (A/CN.9/768, para. 66, and A/CN.9/797, para. 73).

> "***Draft article 17. Possession***
>
> "1. Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met with respect to an electronic transferable record if:
>
> (a) A method is used to establish control of that electronic transferable record; and
>
> (b) The method used is either:
>
> (i) As reliable as appropriate for the purpose for which the electronic transferable record was [generated] [issued], in the light of all the relevant circumstances, including any relevant agreement; or
>
> (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.
>
> "2. A person has control of an electronic transferable record if the method reliably identifies that person as the person in control."

Remarks

24. Draft article 17 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83), forty-ninth (A/CN.9/804, paras. 51-62 and 63-67) and fiftieth (A/CN.9/828, paras. 50-56) sessions.

25. The Working Group may wish to consider whether the word "[generated]" or "[issued]" should be retained in light of their current use and possible substantive law implications (A/CN.9/828, paras. 52-54).

26. The Working Group may wish to clarify the relationship between draft article 17 and draft article 11, which contains a general reliability standard.

27. Draft paragraph 2 reflects the Working Group's decision at its fiftieth session (A/CN.9/828, paras. 64-65). In particular, it was explained that the adoption of such provision would make it possible for "control" to achieve the same result that "possession" of a paper-based transferable document or instrument brought (A/CN.9/828, para. 61); that reference to the person in control of the electronic transferable record does not imply that the person in control is also the rightful holder of that transferable record as this is for substantive law to determine (ibid.); and that reference to the person in control does not exclude the possibility of having more than one person in control (A/CN.9/828, para. 63). Moreover, it was stated that the electronic transferable record in itself did not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performed that function (ibid.). In this respect, it should be noted that identification should not be understood as implying an obligation to name the person in control, as the draft Model Law allows for the issuance of electronic transferable records to bearer, which imply anonymity (A/CN.9/828, para. 51).

28. The Working Group may wish to refer to the draft definition of "control" in draft article 3 when considering draft article 17 (A/CN.9/828, para. 66).

"***Draft article 18. Delivery***

"Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to an electronic transferable record through the transfer of an electronic transferable record."

Remarks

29. Draft article 18 reflects the deliberations of the Working Group at its fiftieth session (A/CN.9/828, para. 68).

30. The Working Group may wish to consider the sequence and placement of draft articles 18, 19 and 20 (A/CN.9/828, para. 75).

31. At the Working Group's fiftieth session, it was suggested that the definition of "transfer" of an electronic transferable record, which set forth that the transfer of an electronic transferable record meant the transfer of control over an electronic transferable record, and draft article 20, which established a functional equivalence rule for the endorsement of an electronic transferable record, should be more closely aligned (A/CN.9/828, para. 79). The Working Group may wish to consider whether that alignment should also involve draft article 18.

32. In that respect, the Working Group may wish to recall that transfer of an electronic transferable record might require under substantive law and contractual agreements both the functional equivalent of transfer of possession, i.e. delivery of a paper-based transferable document or instrument and the functional equivalent of endorsement of a paper-based transferable document or instrument. The Working Group may also wish to recall its decisions to delete a draft provision on transfer (A/CN.9/828, para. 84) as well as a draft rule conveying that transfer of control over an electronic transferable record was necessary to transfer that electronic transferable record (A/CN.9/804, paras. 82 and 85).

33. Under that approach, the Working Group may wish to consider the following alternative text of draft article 18:

["Where the law requires transfer of possession of a paper-based transferable document or instrument or provides consequences for the absence of transfer of possession, that requirement is met through the transfer of control over an electronic transferable record."]

34. The Working Group may wish to consider in conjunction with the alternative text of draft article 18 the deletion of the draft definition of "transfer" contained in draft article 3 also in light of possible conflicts with applicable substantive law.

"***Draft article 19. Presentation***

"Where the law requires a person to present for performance or acceptance a paper-based transferable document or instrument or provides consequences for non-presentation, that requirement is met with respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsements if required, for performance or acceptance."

Remarks

35. Draft article 19 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 73).

"***Draft article 20. Endorsement***

"Where the law requires or permits the endorsement in any form of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to an electronic transferable record if information [relating to the endorsement] [indicating the intent to endorse] is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9."

Remarks

36. Draft article 20 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 80).

37. The Working Group may wish to consider the substitution of the words "relating to the endorsement" with the words "[indicating the intent to endorse]" to better specify that the satisfaction of the generic requirements for writing and signature set forth in articles 8 and 9 should be accompanied by the expression of the intent to endorse.

38. The Working Group may wish to further consider the use of the words "[logically associated or otherwise linked to]" and "[included in]" in light of the considerations expressed at its fiftieth session (A/CN.9/828, paras. 78 and 80) as well as of the definition of "electronic record" in draft article 3, and with a view to providing guidance on their uniform use throughout the draft provisions.

"***Draft article 21. Amendment of an electronic transferable record***

"Where the law requires or permits the amendment of a paper-based transferable document or instrument or provides consequences for the absence of an amendment, that requirement is met with respect to an electronic transferable record if a reliable method is employed for amendment of information in the electronic transferable record whereby the amended information is reflected in the electronic transferable record and is readily identifiable as such."

Remarks

39. Draft article 21 has been recast in light of the suggestions received at the Working Group's fiftieth session (A/CN.9/828, paras. 86 and 90). It aims at providing a functional equivalence rule for instances in which an electronic transferable record may be amended.

40. The word "readily" aims at introducing a stringent standard ensuring that users may easily distinguish amendments (A/CN.9/828, para. 88). In that respect, the Working Group may wish to clarify that the draft article does not intend to introduce a new information requirement.

41. An alternative text of draft article 21 under the "may" approach (see above, para. 9) could read as follows:

["Where the law requires or permits the amendment of a paper-based transferable document or instrument or provides consequences for the absence of an amendment, an electronic transferable record may be amended if a reliable method is employed to reflect the amendment in that record and make it readily identifiable as such."]

42. Another alternative text of draft article 21 under the "this may be achieved" approach (see above, para. 10) could read as follows:

["Where the law requires or permits the amendment of a paper-based transferable document or instrument or provides consequences for the absence of an amendment, this may be achieved in an electronic transferable record if a reliable method is employed to reflect the amendment in that record and make it readily identifiable as such."]

43. In considering the standards for assessing the reliability of the method used for amendment of an electronic transferable record, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 22. Reissuance***

"Where the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued."

Remarks

44. Draft article 22 reflects the Working Groups deliberations at its forty-eighth (A/CN.9/797, para. 104) and fiftieth (A/CN.9/828, para. 93) sessions. It indicates that, similar to paper-based transferable documents or instruments, electronic transferable records may be reissued where substantive law so permits, such as in case of loss or destruction of the original.

45. In that respect, the Working Group may wish to consider whether draft article 22 should be retained in light of draft article 1, paragraph 2.

"***Draft article 23. Change of medium***

"1. If a paper-based transferable document or instrument has been issued and the holder and the obligor agree to replace that document or instrument with an electronic transferable record:

(a) The holder shall surrender the paper-based transferable document or instrument to the obligor;

(b) The obligor shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) Upon issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

"2. If an electronic transferable record has been issued, and the person in control and the obligor agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The person in control shall [surrender] [transfer] the electronic transferable record to the obligor;

(b) The obligor shall issue to the person in control, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) Upon issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

"3. Change of medium according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

"4. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the electronic transferable record has not been issued for technical reasons, the paper-based transferable document or instrument may be reissued [or the replacing electronic transferable record may be issued].

"5. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the paper-based transferable document or instrument has not been issued for technical reasons, the electronic transferable record may be reissued [or the replacing paper-based transferable document or instrument may be issued]."

Remarks

46. Draft article 23 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102-103) and fiftieth (A/CN.9/828, para. 102) sessions.

47. Draft article 23 has a substantive nature due to the fact that substantive law is unlikely to contain a rule on change of medium. It aims at satisfying two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced document or record would not further circulate (A/CN.9/828, para. 95).

48. The requirements set forth in subparagraphs (a), (b) and (c) of paragraphs 1 and 2 are concurrent and not sequential, and the parties are in a position to determine the most adequate sequence for meeting those requirements in light of all circumstances (ibid., para. 98).

49. With respect to the parties whose agreement is required for change of medium, the draft article requires for change of medium the consent of both obligor and person in control or holder. However, the Working Group may wish to note that obligor and issuer may not be the same party in bills of exchange (A/CN.9/828, para. 99). Moreover, under the current definition of "obligor" in draft article 3, the consent of the endorsers would also be required, thus involving a potentially high number of parties not necessarily affected by the change of medium (ibid.).

50. In that respect, the Working Group may wish to further note that prevailing practice, based on contractual terms applicable to registry-based systems, and existing law require only a request of the holder for change of medium and recognize only change from electronic to paper form (A/CN.9/828, para. 100). That approach takes into account the fact that parties involved in the change of medium could be obliged to comply with that request under substantive law if not already bound by contractual terms.

51. In light of the above, the Working Group may wish to consider whether making change of medium conditional only to the request of the holder would suffice. In doing so, the Working Group may wish to take into account draft article 13, requiring agreement to the use of electronic means, including implicitly or in general conditions. In that respect, the Working Group may also wish to consider whether that request of change of medium should be made to the issuer. Another possibility in that respect could be to grant the obligor to whom the document, or instrument or record is presented for performance the possibility to require a replacement at the time of presentation if dissatisfied with the medium in use at that time. The rationale for that rule is that the medium may become relevant for the obligor only at the moment of presentation.

52. Alternatively, the Working Group may wish to consider whether the agreement of the issuer should also be required, also in view of the suggestion to redraft the definition of "obligor" so as not to include endorsers (A/CN.9/828, para. 99).

53. The Working Group may wish to consider whether the word "[surrender]" or the word "[transfer]" should be used in draft subparagraph 2(a). The words "[of control]" have been deleted in light of the definition of "control" contained in draft article 3 (A/CN.9/828, para. 68).

54. Draft paragraphs 4 and 5 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but the corresponding record, document or instrument has not been issued for technical reasons. The Working Group may wish to consider whether such rule would be necessary, as it might not be contained in substantive law since it is specific to replacement due to a technical failure in a procedure involving an electronic transferable record. Alternatively, the Working Group may clarify whether such rule should derive from substantive law, and therefore be applicable to electronic transferable records by virtue of draft article 1, paragraph 2 (see also above, paras. 44-45).

55. The Working Group may wish to consider the relation between draft paragraphs 4 and 5 and draft article 22. The Working Group may also wish to consider the relevance of the use of the word "upon" in draft article 23 for the sequence of invalidation and issuance of documents, instruments and records.

56. The Working Group may wish to consider whether the word "[terminated]" is adequate for the purpose of draft paragraphs 4 and 5, which refer to instances where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in draft subparagraphs 1(c) and 2(c). The word "[invalidated]" might offer an alternative drafting option.

"***Draft article 24. Division and consolidation of an electronic transferable record***

"1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, an electronic transferable record may be divided or consolidated if:

(a) A reliable method is used to divide or consolidate the electronic transferable record; and

(b) The divided or consolidated electronic transferable record contains a statement identifying it as such.

"2. Upon division or consolidation, the pre-existing divided or consolidated electronic transferable records cease to have any effect or validity."

Remarks

57. In light of the suggestions made at the Working Group's fiftieth session, draft article 24 has been recast as a more generic functional equivalence rule including certain elements of the previous draft article (A/CN.9/828, para. 104).

58. The Working Group may wish to consider whether draft subparagraph 1(b) introduces a substantive rule and, in that case, whether it is justified in light of the use of electronic means.

59. The Working Group may also wish to consider whether draft paragraph 2 should be retained, including for declaratory purposes, or deleted as it might interfere with substantive law.

60. In considering the standards for assessing the reliability of the method used for division and consolidation of electronic transferable records, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 25. Termination of an electronic transferable record***

"1. Where the law requires or permits the termination of a paper-based transferable document or instrument or provides consequences for its non-termination, an electronic transferable record may be terminated if a

reliable method is used [to terminate the electronic transferable record] [to prevent further [transfer][circulation] of the electronic transferable record]."

Remarks

61. Draft article 25 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, para. 106) and fiftieth (A/CN.9/828, para. 108) sessions. It now contains a general functional equivalence rule that follows the structure of similar rules dealing with requirement or possibility (see also above, paras. 7-10).

62. Draft article 25 aims at providing guidance on how termination could be achieved in an electronic environment. Draft article 23 of the Model Law contains a reference to termination of electronic transferable records.

63. The Working Group may wish to consider whether to retain the word "[circulation]" or the word "[transfer]" also in light of the definition of "transfer" contained in draft article 3 and of the fact that at the Working Group's fiftieth session it was said that the reference to the word "[circulation]" was unclear (A/CN.9/828, para. 105).

64. In considering the standards for assessing the reliability of the method used for termination of an electronic transferable record, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 26. Use of an electronic transferable record for security right purposes***

"1. Where the law permits the use of a paper-based transferable document or instrument for security right purposes, an electronic transferable record may be used for those purposes if a reliable method is provided to allow the use of electronic transferable records for security right purposes.

"[2. Nothing in this Law affects the application of any rule of law governing security rights in paper-based transferable documents or instruments or electronic transferable records.]"

Remarks

65. In light of the suggestions made at the Working Group's fiftieth session, draft article 26 has been realigned with other functional equivalence rules (A/CN.9/828, para. 110).

66. Draft paragraph 2 has been inserted to clarify that the draft Model Law would not affect the substantive law governing security rights (A/CN.9/828, para. 111).

67. An alternative text of draft article 26, specifying the requirements for the perfection of security rights or interests upon an electronic transferable record, might read as follows:

["***Draft article 26. Perfection of security rights or interests upon an electronic transferable record***

"1. Where the law requires or permits perfection of a security interest on a paper-based transferable document or instrument [or provides consequences for its absence], that requirement is met with respect to an electronic transferable record:

(a) If the law requires [a qualified transfer, or] endorsement and delivery of the paper-based transferable document or instrument, with the transfer of control of the record and its endorsement [in accordance with [articles 18 and 20 of] this Law];

(b) If the law requires the amendment, or the amendment and signature of the paper document, with the amendment, or the amendment and the signature of the electronic transferable record [indicating the intent to perfect a security right] [in accordance with [articles 9 and 21 of] this Law].

"[2. Nothing in this Law affects the application of any other provision regulating security rights or interests that may be perfected upon an electronic transferable record or a paper-based transferable document or instrument.]"]

68. In considering the standards for assessing the reliability of the method used for the use of an electronic transferable record for security right purposes, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 27. Retention of [information in] an electronic transferable record***

"1. Where the law requires that a paper-based transferable document or instrument be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 10[, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information enabling the identification of the [issuer and person in control of the electronic transferable record] [parties] and [indicating the date and time [when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated]]] [of legally relevant events] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record [and indicating the date and time of their involvement] is made available].

"2. A person may satisfy the requirement referred to in paragraph 1 by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met."

Remarks

69. Draft article 27 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to take into consideration draft article 10, subparagraph 1(c) and paragraph 2, on integrity when discussing draft article 27.

70. The Working Group may wish to consider whether reference should be made to retention of an electronic transferable record in spite of the fact that the retained electronic record may no longer be transferred. In that respect, the Working Group may wish to consider making reference to the information contained in the electronic transferable record or, alternatively, to an "electronic record".

71. The words "[, apart from any change that arises from the need to ensure that the record may not further circulate]" were added in subparagraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

72. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72). In particular, the words "[parties]" and "[of legally relevant events]" have been added in subparagraph 1(c) to capture all parties and events relevant during the life cycle of the electronic transferable record.

References to the date and time of relevant events have also been added. The Working Group may wish to consider whether those drafting suggestions should be retained and, if so, whether the resulting subparagraphs 1(c) and 1(e) coincide in scope and operation. In that regard, the Working Group may wish to clarify, also in light of draft article 15, whether requirements on the information to be retained should be set forth in substantive law.

73. The Working Group may also wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

74. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft Model Law (A/CN.9/797, para. 104, subpara. (b), and A/CN.9/WG.IV/WP.124/ Add.1, para. 43). In that case, the Working Group may wish to clarify whether that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

D. Third-party service providers (Articles 28-29)

"***Draft article 28. Conduct of a third-party service provider***

"Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with statements made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy of all statements made by it;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify [the [issuer][obligor] and the person in control] [concerned parties];

(ii) That the electronic transferable record has retained its integrity and has not been compromised;

(iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(e) Use trustworthy systems, procedures and human resources in performing its services."

"***Draft article 29. Trustworthiness***

"For the purposes of article 28, subparagraph (e), in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of electronic transferable records;

(d) Availability of information to related parties;

(e) Regularity and extent of audit by an independent body;

(f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and

(g) Any other relevant factor."

75. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 28 and 29 on third-party service providers had already been revised in light of the considerations expressed by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

76. The placement of these draft articles would depend on the final form of the draft provisions. In that respect, it was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

77. The words "[concerned parties]" have been added in draft article 28, subparagraph (d)(i), to require identification of all parties relevant during the life cycle of the electronic transferable record. That may be necessary, for instance, to ensure the possibility of an action in recourse.

78. The Working Group may wish to clarify the meaning of the term "relying party" in draft article 28 (A/CN.9/797, para. 107) also in view of the definition of "relying party" contained in article 2(f) of the UNCITRAL Model Law on Electronic Signatures.

E. Cross-border recognition of electronic transferable records (Article 30)

"***Draft article 30. Non-discrimination of foreign electronic transferable records***

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used [in a foreign State][abroad][outside [the enacting jurisdiction]][, or that its issuance or use involved the services of a third party based, in part or wholly, [in a foreign State][abroad][outside [the enacting jurisdiction]]][, if it offers a substantially equivalent level of reliability].

"2. Nothing in this Law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records."

Remarks

79. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[3] The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

80. Draft article 30 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

81. The Working Group may wish to clarify if under draft article 30 an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 30.

[3] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

82. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words "[, if it offers a substantially equivalent level of reliability]" are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

83. Paragraph 2 reflects the Working Group's understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

E. Note by the Secretariat on mobile commerce/payments effected with mobile devices - Possible future work: Proposal by Colombia

(A/CN.9/WG.IV/WP.133)

[Original: English]

Within the framework of preparation for the fifty-first session of Working Group IV (Electronic Commerce), the Government of Colombia has submitted to the Secretariat the attached document.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

Annex

Introduction

According to document A/CN.9/728, at its fortieth session the United Nations Commission on International Trade Law (UNCITRAL) requested that the Secretariat closely follow legal developments in the area of electronic commerce, with a view to making suggestions in due course. At its forty-third session, the Commission requested that the Secretariat organize a colloquium on the topics discussed in document A/CN.9/692 — electronic transferable records, identity management and the use of mobile devices in electronic commerce — and that it prepare a note summarizing the discussions in the colloquium in order to provide information enabling the Committee to adopt a decision which would give the Working Group on Electronic Commerce a "*clearly defined mandate*" in this regard.

Taking into account that one of the Commission's functions is to modernize and harmonize the rules of international trade, the Colombian delegation wishes to propose to the delegations of the States members of the Commission and those attending Working Group IV (Electronic Commerce) that, following completion of work on the draft rules on electronic transferable records, rules on mobile commerce or mobile payments be considered as a possibility for discussion in subsequent sessions of Working Group IV.

Similarly, online banking processes effected through mobile financial services must be taken into account when reviewing rules on mobile payments, in order to harmonize legislation with current technological trends and payment mechanisms for local and cross-border electronic commerce.

It might also be useful if the Commission and the States members of UNCITRAL Working Group IV provided general guidelines on the adoption of appropriate legal regulations, particularly on the use of mobile devices for financial purposes or as a means of payment in the completion of electronic commerce transactions.

Electronic commerce conducted with mobile devices

- **The growth of mobile devices**

The Communications Regulatory Commission (CRC) of Colombia has indicated that the accelerated development of technological convergence at an international level has facilitated the integration of communication and media services, a situation which has led to the emergence of a more sophisticated consumer group that demands immediate and continuous access to ICT-related services. Moreover, the document notes, there has been significant growth in the market for content and applications, which has significantly altered the dynamics of the markets and businesses in all productive sectors.[1]

The worldwide penetration of mobile telephone services is approaching 100 per cent, which means that in the short term there will be as many mobile phone lines as people,[2] a trend that is widespread in most of the world's countries, with a few exceptions. In the case of Colombia, by the end of 2012 penetration had reached

[1] www.crcom.gov.co/uploads/images/files/Reporte_Industria_2013_11.pdf. Communications Regulation Commission - Republic of Colombia ICT Industry Report - November 2013. At www.mintic.gov.co.

[2] Ibidem.

103 subscribers per 100 inhabitants, very similar to the continent's aggregate penetration.[3]

The impact of mobile devices on development is recognized in United Nations scenarios, for example in the 2009 Information Economy Report of the United Nations Conference for Trade and Development (UNCTAD),[4] which shows that in recent years mobile devices have been useful in developing countries in making up for the failures of limited communications infrastructure. This is in addition to the rapid growth in the number of users of such devices, a trend that has led to an increased supply of smartphone services, such as the use of mobile devices for sending and receiving electronic communications via Short Messaging Services (SMS), browsing the Internet through Wireless Application Protocol (WAP), and performing contactless transactions based on Near Field Communication (NFC) applications. In most of these cases, the communication may be qualified as of an electronic nature like data messages in accordance with UNCITRAL texts.[5]

UNCITRAL[6] notes the need for legislation that enhances the predictability of the legal status of transactions conducted with electronic means, including those effected with mobile devices, as some less developed countries do not yet have general electronic commerce laws, and other countries, having explicitly indicated that mobile commerce is among the forms of electronic commerce covered by technology-neutral legislation, have passed special legislation on the matter. Legislation would be the most appropriate way to update and harmonize all such regulations, without the inconvenience of individual regulatory efforts.

In Colombia, for example, the Financial Inclusion Act has been adopted, which seeks to promote digital payments using the installed capacity of existing networks throughout the country where mobile phone penetration will have a significant impact, with a view to promoting the use of digital devices as financial tools for processing basic financial transactions.[7]

On this issue, the International Telecommunication Union (ITU) has indicated that between 2010 and 2011[8] mobile-cellular subscriptions registered continuous double-digit growth in developing-country markets, but an overall slowdown in comparison with previous years. According to the ITU, the number of mobile-cellular subscriptions increased by more than 600 million, almost all in developed countries, to a total of around 6 billion, or 86 per 100 inhabitants, globally. Mobile-cellular penetration increased by 11 per cent worldwide, compared with 13 per cent the previous year. Overall, the increase in the number of service providers has resulted in competition in the sector and has lowered consumer prices significantly, which has been a key factor in the spread of mobile-cellular services, according to the ITU study.[9]

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[3] Ibidem. The reports of the Ministry of Information and Communication Technologies of Colombia (MINTIC) indicate that by the end of the first quarter of 2014 the total number of subscribers to mobile telephone services was 51,594,619 and that, according to the number of subscribers to mobile telephone services, there are 108.3 service subscribers per 100 inhabitants. There is now major penetration in the use of mobile devices, especially smartphones, in many developed countries and to a lesser, although significant, extent in developing countries.

[4] In document A/CN.9/692. Available at http://unctad.org/en/docs/ier2009_en.pdf.

[5] Document A/CN.9/692. Present and possible future work on electronic commerce. UNCITRAL, 2010.

[6] Idem, para. 69.

[7] Act No. 1735 of 2014, *Por el cual se dictan medidas tendientes a promover el acceso a los servicios financieros transaccionales y se dictan otras disposiciones* (Establishing measures to promote access to financial transaction services and other measures).

[8] International Telecommunication Union (ITU), Measuring the Information Society 2012 Executive Summary. At www.itu.int/dms_pub/itu-d/opb/ind/D-IND-ICTOI-2012-SUM-PDF-E.pdf.

[9] At www.itu.int/dms_pub/itu-d/opb/ind/D-IND-ICTOI-2012-SUM-PDF-E.pdf.

- **Mobile payments and mobile commerce**

UNCTAD points out that mobile commerce has been defined as "*commercial transactions and communication activities conducted through wireless communication services and networks by means of short message services ('SMS'), multimedia messaging service ('MMS'), or the Internet, using small, handheld mobile devices that typically had been used for telephonic communications*",[10] which also involves accessing data via such devices, which boosts the apps sector.

Moreover, in document A/CN.9/728 the following definition of **mobile commerce** was suggested as a starting point for future discussions: "*any commercial transaction and communication activity conducted through wireless communication services and networks using handheld mobile devices designed to be used in mobile or other wireless communications networks*". [11] This definition extends the scope of application of mobile commerce by not limiting it solely to smartphones, but by also including any device which uses wireless mobile networks, such as Wi-Fi, NFC, and Bluetooth, including text messages or chat forums and social networks.

However, means of payment based on text messages and services (SMS or MMS), as well as near field communications (NFC), are emerging worldwide. ISACA, an ICT-based non-governmental organization, has noted that the widespread use of **smartphones** and the convenience and mobility that these devices offer users and consumers by providing services over and above simple communication are the main factors behind the growing interest in payments effected with such devices. [12] Furthermore, payment solutions provider Adyen[13] indicates in the latest edition of its Global Mobile Payments Index[14] that the number of mobile payments continues to increase worldwide.

Similarly, the consultancy firm *Flurry Mobile*[15] reported the worldwide growth of smartphones and tablet devices in its most recent report.[16] In January 2013, China and the United States had roughly the same active smart device installed base, that is, 222 million in the United States compared to 221 million in China. According to the firm's estimates, by the end of February 2013 China would have 246 million devices compared to 230 million in the United States, followed by the United Kingdom, considered the third largest market in the world with 43 million devices.[17]

ISACA's report[18] indicates that in the European Union in particular the relaxation of restrictions imposed on payment operators is changing the landscape of mobile payments in that region. Specifically, a number of new actors (including mobile phone operators and department stores) will be officially recognized as payment service providers (PSP), although they are not traditional credit institutions (as defined by

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[10] OECD, Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce, June 2008. Cited in Document A/CN.9/728. United Nations Commission on International Trade Law, forty-fourth session. Vienna, 27 June - 15 July 2011. Present and possible future work on electronic commerce. Note by the Secretariat.

[11] Document A/CN.9/728. United Nations Commission on International Trade Law, forty-fourth session. Vienna, 27 June-15 July 2011. Present and possible future work on electronic commerce. Note by the Secretariat. Paragraph 35.

[12] Emerging Technologies. ISACA Emerging Technology White Paper November 2011. At www.isaca.org/chapters8/Montevideo/cigras/Documents/cigras-2012-03-mobile-payments-wp-espaol.pdf.

[13] Adyen is an Internet-based omni-channel payment solutions provider. See www.adyen.com.

[14] www.ayden.com/home/about-ayden/press-room/press-releases/mobile-payments-index-july-2014.html. The Adyen Global Mobile Payment Index is published quarterly based on data from payments made through the company.

[15] Cited by a national publication in REDACCIÓN TECNOLOGIA, Publication. eltiempo.com. Section: Tecnosfera. Date of publication: 19 February 2013. Author: REDACCIÓN TECNOLOGÍA. Colombia.

[16] Accessible at www.flurry.com/bid/94352/China-Knocks-Off-U-S-to-Become-World-s-Top-Smart-Device-Market.

[17] Idem.

[18] Emerging Technologies. ISACA Emerging Technology White Paper. November 2011. At www.isaca.org/chapters8/Montevideo/cigras/Documents/cigras-2012-03-mobile-payments-wp-espaol.pdf.

European Union Directive No. 2000/12/EC) and it is clear that they will be permitted to operate in direct competition with traditional credit/financial institutions, in compliance with the requirements set forth in the Directive.

According to an OECD study, Latin America already relies on additive mobile banking models (which incorporate mobile banking solutions into the existing financial distribution offer). The study notes that, "[*a*]*mong the transactions most commonly offered through mobile channels, in addition to cash management operations (which remain very popular), are domestic money transfers and payments, especially for utility bills, and the purchase of air time, probably the most popular service according to initial indications*."[19]

Colombia and mobile financial services — MFS

Mobile financial services, according to the OECD "[*i*]*nclude mobile banking services, services provided through mobile wallets and access via mobile phone to financial services such as loans, securities trading or the sending and receiving of remittances*."[20] One of the most important cases to be highlighted is that of the Kenyan mobile-phone based banking service "*M-Pesa*", which was created in 2005 by Safaricom[21] — a subsidiary of the English company Vodafone — and launched in March 2007.[22]

Electronic commerce conducted via mobile devices, and mobile payments in particular, is of especial importance to the competitiveness of Colombia, given the impetus it provides to banking processes and to the significant penetration of smartphones and tablet devices in Colombia, which in turn increases the use of electronic media as a transaction channel. Similarly, in the Colombian Government's National Development Plan 2010-2014: Prosperity for All, mobile financial services (MFS) are discussed in the chapter on Information and Communication Technology, which was the basis for the CRC's document "Promotion of Financial Services provided via Mobile Networks and Complementary Measures for the Provision of Content and Applications. Yellow Paper on Coordination of Financial and Accounting Analysis"[23] of October 2013.

The CRC document considers MFS to be a promising market, bearing in mind that nearly half the world's population uses mobile communications and that developing countries in particular have registered the largest increase in the implementation of these services due to the high penetration of information and communication technologies, which, according to the document, act as a bridge to providing other services, especially those targeting the poorer classes.[24]

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[19] *Telefonía Móvil y Desarrollo Financiero en América Latina* (Mobile Phones and Financial Development in Latin America) - Authors (International Financial Analysts): Emilio Ontiveros Baeza, Alvaro Martín Enríquez, Santiago Fernández de Lis, Ignacio Rodríguez Téubal and Verónica López Sabater. Editing Coordinator: Jaime García Alba (Inter-American Development Bank) At www.oecd.org/dev/americas/42825577.pdf. Accessed 13 December 2014.

[20] Idem.

[21] "The company Safaricom, established in Kenya, is one of the main integrated communications companies in East and Central Africa. Safaricom was founded in 1997 and by the end of 2012 employed over 1,500 people, mainly located in Nairobi and in other major cities such as Mombasa, Kisumu, Nakuru and Eldoret. Since its inception, Safaricom has been successful in its aim to satisfy its subscribers, which has resulted in an increase in the subscriber base, with more than 17 million currently subscribed to the network. Safaricom offers a full range of services, from fixed and mobile voice services to data services, on various platforms." At www.worldmanuals.com/safaricom1 [*Translator's note*: invalid url].

[22] For further information: http://digital.law.washington.edu/dspace-law/handle/1773.1/1199.

[23] *Promoción de servicios financieros sobre redes móviles y medidas complementarias para provisión de contenidos y aplicaciones. Documento Amarillo Coordinación de Análisis Financiero y Contable*. At www.crcom.gov.co/uploads/images/files/DocSoporte_SFM.pdf.

[24] Idem. Pp. 13 and 14.

- **Financial Inclusion: Colombia**

Colombia adopted Act No. 1735 of 2014 — the Financial Inclusion Act — which, according to its preamble,[25] defines financial inclusion as access to and use of responsible financial services by the majority of the population, which is highly important as it contributes significantly to the country's economic development as it allows both the consumption capacity of households and investment potential to increase.

This Act establishes **companies specializing in electronic deposits and payments** and supervised financial bodies with light regulatory requirements, which may attract public savings only in order to offer services for payments, money orders, transfers, collection and savings, and therefore may administer their resources in order to provide various transaction services.[26] Banks, mobile operators, postal operators or any interested party may set up a company specializing in electronic deposits and payments provided they meet all the legal conditions required to form a financial institution, inasmuch as the resources received by these companies must be deposited in demand deposits managed by credit establishments or in an account of the Central Bank (Bank of the Republic), if so authorized by the Bank's Board of Directors.[27],[28]

Working Group I document A/CN.9/800 — Micro, Small and Medium-Sized Enterprises (MSMEs) — Possible Future Work — states that the Working Group recognizes and welcomes the mandate given by the Commission to establish a legal framework conducive to facilitating the activity of MSMEs throughout their life cycle, beginning with the implementation of simplified rules for the establishment and operation of these companies, in addition to other topics such as "*financial inclusion, including mobile payments, access to credit, alternative dispute resolution and simplified insolvency rules*",[29] which implies that the work on mobile payments to be developed in Working Group IV may serve as the starting point for the other UNCITRAL Working Groups upon request.

We may therefore conclude that there is a significant relationship between the growth of platforms designed to provide more than voice services and the growth in global demand for intelligent mobile devices such as smartphones and tablets, which relationship will enable the development of new business models that would necessarily involve regulation of the legal and technological security of commercial transactions, job creation, protection of personal data, consumer protection, *habeas data* and intellectual property rights.

Conclusion

We therefore request that the delegations of the States members of the United Nations Commission on International Trade Law (UNCITRAL), particularly those attending Working Group IV, take this paper into consideration for possible future work, once the study of the regime for electronic transferable records has been completed, and that the potential for mobile commerce or mobile payments be discussed in the

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[25] At www.legismovil.com/BancoMedios/Archivos/pl-181-14s%20to%20(inclusion%20financiera).pdf.

[26] Ministry of Finance and Public Credit Colombia. *ABC Proyecto de Ley de Inclusión Financiera: Sociedades Especializadas en Depósitos y Pagos Electrónicos* (ABC Draft Financial Inclusion Act: Companies Specializing in Electronic Deposits and Payments.) 4 September 2014. At: www.minhacienda.gov.co/portal/page/portal/HomeMinhacienda/saladeprensa/09032014-abc-inclusion-financiera.

[27] According to this Act, companies specializing in electronic deposits and payments shall have a minimum capital of five thousand eight hundred and forty-six million pesos ($5,846,000,000).

[28] Mobile payment systems are also being discussed in the United States: Mobile Payments in the United States: Mapping Out the Road Ahead. Darin Contini and Marianne Crowe, Federal Reserve Bank of Boston, Cynthia Merritt and Richard Oliver, Federal Reserve Bank of Atlanta, and Steve Mott, BetterBuyDesign. March 25, 2011.

[29] A/CN.9/800. Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014).

following sessions with a view to developing a regime to harmonize and unify the individual systems under review.

V. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its forty-sixth session (Vienna, 15-19 December 2014)

(A/CN.9/829)

[Original: English]

Contents

I. Introduction

A. Directors' obligations in the period approaching insolvency: enterprise groups

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same

time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group, whose task would be to examine how part four of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) could be applied in the enterprise group context and identify any additional issues (such as conflicts between a director's duty to its own company and the interests of the group, as well as issues of governing law) that might need to be addressed. The informal expert group was to report back to the Working Group no later than the session in the second half of 2014 (A/CN.9/798, para. 23). The discussion in the informal group formed the basis of the working paper prepared for consideration by the Working Group at its forty-sixth session.

B. Facilitating the cross-border insolvency of multinational enterprise groups

2. At its forty-fourth session (December 2013), the Working Group had also agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the Legislative Guide and involve reference to the Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session (April 2014) (A/CN.9/803).

C. Recognition and enforcement of insolvency-derived judgements

3. At its forty-fourth session (December 2013), Working Group V had further agreed (A/CN.9/798, para. 30) that, at an appropriate time, it should seek a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements, which had been discussed at the colloquium held in conjunction with the forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to the two topics concerning treatment of enterprise groups in insolvency, Working Group V's other priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the Model Law. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155).

II. Organization of the session

4. Working Group V, which was composed of all States Members of the Commission, held its forty-sixth session in Vienna from 15-19 December 2014. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Canada, China, Colombia, Denmark, France, Germany, Greece, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Namibia, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, 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: Bolivia (Plurinational State of), Chile, Czech Republic, Dominican Republic, Egypt, Haiti, Libya, Montenegro, Qatar, Romania, Slovakia, Syrian Arab Republic and Tunisia.

6. The session was also attended by observers from the Council of Europe and the European Union.

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

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), INSOL Europe, INSOL International (INSOL), International Bar Association (IBA), International Insolvency Institute (III), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA) and Union Internationale des Avocates (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Bernice Gachegu (Kenya)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.123);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.124);

(c) A note by the Secretariat on the obligations of directors of enterprise group members in the period approaching insolvency (A/CN.9/WG.V/WP.125); and

(d) A note by the Secretariat on the recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.126).

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: (a) the obligations of directors of enterprise group members in the period approaching insolvency; (b) facilitating the cross-border insolvency of multinational enterprise groups; and (c) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations with the obligations of directors of enterprise group members in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.125; followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.124; and the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.126. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Directors' obligations in the period approaching insolvency: enterprise groups

12. The Working Group commenced its discussion of this topic on the basis of the draft recommendations contained in document A/CN.9/WG.V/WP.125.

Purpose clause

13. The Working Group expressed no view as to the inclusion of the first sentence in square brackets, which provided the context for the purpose clause to draft recommendations 255 and 256 (EG). The Working Group agreed that the purpose clause should be revised as follows:

(a) In subparagraph (a), remove the square brackets and retain the text as "of the enterprise group member";

(b) Retain subparagraphs (b) and (c) as drafted;

(c) Retain paragraph (d) without the square brackets;

(d) In subparagraph (e), delete the first optional text, remove the square brackets contained in the remaining text, and delete the phrase "and of the group member as part of that enterprise group"; and

(e) In paragraph (a) of the safeguard provision at the end of the purpose clause, add the word "unnecessarily" at the beginning, delete the first optional text, and add the words "or some of its parts" after the phrase "an insolvency solution for the enterprise group as a whole".

14. It was stated that the difficulty in reaching appropriate language to address the directors' obligations in the period leading to insolvency resided in establishing a balance between the duty of directors towards the group member they represented and the interests of the enterprise group as a whole. The Working Group concluded that in reference to the enterprise group, directors owed a primary duty to the enterprise group member they represented. They could take into account the interests of the enterprise group only if doing so did not result in steps being taken that were contrary to that duty.

15. It was said that employees should be included among the parties in interest to be considered in the context of insolvency and that by virtue of the declaration on the Rule of Law adopted by the General Assembly,[1] UNCITRAL should consider, in its work on the modernization and harmonization of international trade law, the importance of predictable legal frameworks for generating employment.

Draft recommendation 255 (EG)

16. In reference to draft recommendation 255 (EG), the Working Group agreed to delete the phrase "and of other group members" in the chapeau and in paragraph (b), as well as to delete the remaining square brackets in the chapeau and retain the text.

17. Several proposals to revise the draft recommendation were made as follows:

Variant A:

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and to take reasonable steps:

(a) To avoid insolvency; and

(b) To minimize the extent of insolvency and its impact on creditors and other stakeholders of the enterprise group member and, where not inconsistent with those duties, take into account the possible benefit of maximizing the value

[1] GA res 67/1. The treatment of employees in insolvency is addressed in the UNCITRAL Legislative Guide on Insolvency Law, part two, chap. II, para. 145 and chap. V, paras. 72-73.

of the enterprise group and promoting an insolvency solution for the enterprise group as a whole, or some of its parts, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

Variant B:

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and to take reasonable steps:

(a) To avoid insolvency; and

(b) Where it is unavoidable, to minimize the extent of insolvency, taking into account, to the extent it is not inconsistent with the interests of creditors and other stakeholders of the group member, the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole, or some of its parts, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

Variant C:

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and insofar as not inconsistent with that, they may take steps to promote an insolvency solution for the enterprise group as a whole or some of its parts. In order to do so, they will have the obligations to take reasonable steps:

(a) To avoid insolvency of their group member insofar as that is consistent with a group solution; and

(b) Where insolvency of that group member is unavoidable, to minimize its impact on the creditors and other stakeholders of that group member, taking into account the possible benefit of maximizing the value of the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

18. The Working Group agreed to deliberate on the variants as drafted and return to them later in the session. However, some preliminary support was expressed for the text in Variant C, with the suggested deletion of the phrase “insofar as that is consistent with a group solution” from subparagraph (a) and its insertion after the phrase “to minimize its impact on the creditors and other stakeholders of that group member” in subparagraph (b). In addition, it was observed that paragraph (e) of the purpose clause, referring to the principle that the creditors of the relevant group member and its other stakeholders should be no worse off under a group solution than if a solution for the individual group member had been pursued, should be reiterated in the substantive recommendations.

19. After further consideration, the following suggestions were made with respect to the revised draft recommendation. With respect to the chapeau of Variant C, some support was expressed in favour of revising the second sentence to read: “in order to do so, reasonable steps may include” and in the first sentence, replacing “not inconsistent with that” with “not inconsistent with those obligations” or “those responsibilities”.

20. Some support was expressed in favour of deleting “insofar as it is consistent with a group solution” from subparagraph (a) of Variant C.

Draft recommendation 256 (EG)

21. In reference to draft recommendation 256 (EG), the Working Group agreed to insert in the chapeau phrases along the lines of "to the extent possible" and "to the extent not inconsistent with the obligations of the director to the group member of which they are a director" to make it clear that the draft recommendation was not intended to create additional obligations and that the appropriateness of the steps to be taken would vary depending on the factual context. It was agreed that only those listed paragraphs that had a specific identifiable purpose in the context of enterprise groups, and that were not inconsistent with recommendation 256 of part four of the Legislative Guide, should be included. Accordingly, it was agreed that only paragraphs (a), (b), (d), (g) and (j) would be retained for further consideration, with the substance of paragraphs (a), (b), (d) and (g) forming an initial group of possible steps (adjusted in terms of importance), and paragraph (j) forming a second category.

22. It was agreed that the text in paragraphs (a), (b), (d) and (g) should be retained without square brackets; that in paragraph (a) the phrase "or some of its parts" be inserted at the end of the paragraph and that the word "ascertain" might be replaced with a word along the lines of "consider"; and that in paragraph (b) the word "which" might be replaced with "whether". In addition, there was support for the suggestion that consideration should be given to dividing paragraph (d) into two separate paragraphs.

23. After considering the content of paragraph (j), there was agreement that the first phrase "commencing or requesting the commencement of formal reorganization or liquidation proceedings" should be deleted. In response to a question as to how the phrase "considering the court in which proceedings should be commenced" should be interpreted, it was suggested that while a choice of court would generally be governed by rules on competence, there might be an element of strategic planning when considering insolvency proceedings for group members. Accordingly, that question should be revisited after consideration of the material on cross-border insolvency of groups (A/CN.9/WG.V/WP.124).

24. In addition, a suggestion was made that, before taking the step under paragraph (j), a director would have to provide notice to group members of that intended action in order to comply with the legal requirements in some States. It was observed that the question of notice in relation to commencement was already addressed in various recommendations of the Legislative Guide and did not need to be included in draft recommendation 256 (EG). In addition, a concern was expressed that inclusion of such a notice provision in paragraph (j) would only be appropriate if the provision of such notice could be considered a reasonable step to be taken to meet the obligation under draft recommendation 255 (EG). After discussion, there was insufficient support in the Working Group to add a requirement for such notice to the draft recommendation, but there was agreement that the issue could be addressed in the commentary.

Draft recommendations 256 (EG) bis and ter

25. The Working Group agreed that the purpose clause was acceptable as drafted.

26. The Working Group agreed to the following revisions to recommendation 256 (EG) bis:

(a) To retain the first optional text without square brackets;

(b) To delete the second optional text; and

(c) To revise the third optional text so that the draft recommendation will read "owed in relation to the creditors and other stakeholders of".

27. Concerns were expressed with respect to the inclusion of recommendations on conflict of obligations on the basis that that issue would typically be dealt with under applicable company law. It was observed, however, that since recommendations 256 (EG) bis and ter were limited to the period approaching insolvency and many laws did not specifically address that context, the recommendations should be retained.

28. Other reservations were expressed with respect to the references to resignation as a possible step that might be taken to manage conflict of interest. One view was that including it in the draft recommendation might be regarded as encouraging resignation as a particular solution. It was acknowledged, however, that situations could be envisaged in which resignation would be an appropriate course of action, but only as a last resort. With that in mind, it was agreed that the phrase ", as a last resort," should be added after the phrase "cannot be reconciled and". It was also agreed that the commentary should reflect the concern that resignation was not intended to be anything other than a measure of last resort; it was recalled that resignation had been considered in terms of director liability in paragraph 27 of part four of the Legislative Guide. An additional issue with respect to resignation was clarifying that the director may have a choice as to which directorship was resigned; in some cases, that decision might not necessarily involve resignation from an insolvent group member, but could also be from a solvent member.

29. The Working Group agreed to the following revisions to recommendation 256 (EG) ter:

(a) To add as a new step the following: "not participating in any decision by the board of directors of the same member on the matters giving rise to such conflicts"; and

(b) To add "other directors of relevant members" to the list of parties to whom disclosure should be made.

30. A proposal was made to revise draft recommendation 256 (EG) ter as follows:

> "The insolvency law may specify that a director faced with conflicting obligations should take reasonable steps to manage those conflicts. Those steps may include obtaining professional advice to establish the exact nature of the conflicting obligations and how to manage them, and disclosing to other directors, creditors and other stakeholders the nature of the conflict and the situations in which the conflict is likely to arise. In determining whether conflicts are adequately managed, a director should consider whether the steps taken are sufficient so that the creditors and other stakeholders of the group members of which they are a director are in no worse a position than they would have been had the conflicts not arisen. As a last resort, the director may need to resign from any group member in relation to which the conflict is not adequately manageable."

Draft recommendation 258

31. The Working Group addressed the questions raised in paragraphs 10-11 of A/CN.9/WG.V/WP.125, concerning the appropriateness of recommendation 258 to the group context. It was noted that part four of the Legislative Guide left open the question of what constituted a shadow director, which might raise questions in the group context as to whether it would cover other group members. After discussion, it was generally agreed that recommendation 258 as drafted was appropriate for the group context.

Form of the draft recommendations

32. There was general agreement in the Working Group that the recommendations should form an additional section of part four of the Legislative Guide.

V. Facilitating the cross-border insolvency of multinational enterprise groups

33. As a preliminary matter, the Working Group considered what it was seeking to achieve through this work on enterprise groups and the form that any text should take. Although some concerns were expressed in respect of moving toward the development of a model law or model legislative provisions, there was support for

adopting that approach as a working assumption. It was observed that certain issues raised in A/CN.9/WG.V/WP.124 lent themselves more readily to treatment in a model law than others, which might better be addressed by way of legislative guidance and that those issues could be identified as discussions progressed.

34. After discussion, the Working Group agreed to proceed in its deliberations on the basis of that working assumption, noting the importance of maintaining a flexible approach.

A. The goals of a cross-border insolvency regime for groups

35. The Working Group considered paragraph 3 of A/CN.9/WG.V/WP.124, and acknowledged that while it would be important to develop goals for any text to be developed, subparagraphs (a) to (g) were more in the nature of tools to be used to achieve possible goals rather than goals in themselves. A number of concerns were expressed as to the scope and content of those subparagraphs, including that there might be inconsistencies with some of the approaches adopted in part three of the Legislative Guide. Nevertheless, it was suggested that paragraph 3 could be useful in helping to identify individual elements of a regime for the cross-border insolvency of groups and that some of the issues raised had already been considered. One example cited concerned paragraph 3, subparagraph (a) and the Working Group's previous discussion of forward planning for commencement of insolvency proceedings and the use of living wills for financial institutions.[2] Another suggestion was that those subparagraphs could be classified into three main areas: (1) limiting the commencement of multiple proceedings; (2) improving cross-border coordination and cooperation when multiple proceedings were required; and (3) improving local insolvency laws to facilitate achievement of (1) and (2). Reaching consensus on those three areas, it was proposed, could facilitate the development of model provisions.

36. It was observed that the preamble to the Model Law, whilst requiring tailoring to the group context, might serve to inform the Working Group's discussion on goals and form the basis for a text to be considered at a future session.

37. It was also suggested that an overarching goal might be the achievement of a group solution, the common purpose of which would be the reorganization or sale as a going concern (of the whole or part of the business or assets) of one or more of the participating members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole, or to a member or members of the enterprise group. Such a solution:

(a) Could include proceedings taking place in more than one jurisdiction;

(b) Would involve more than one member of the enterprise group, one or more of which should be presently or imminently insolvent;

(c) Would not exclude any group member affected by the outcome of the group solution from participating in that solution; and

(d) Would safeguard the position of the creditors and other stakeholders of each member participating in the group solution from any harm resulting from that participation.

B. Key elements of a group regime

1. Access

38. The Working Group noted the access provided by articles 9 and 13 of the Model Law and expressed the view that something wider might be required in the group context, for example, providing access for other group members and their creditors. However, the view was also expressed that it was difficult to resolve this issue before

[2] A/CN.9/803, para. 37.

answering questions such as why access was required, for example to obtain recognition, and the court from which it might be sought.

2. Recognition of foreign proceedings

39. The Working Group expressed serious reservations in respect of paragraph 16 and the reference to commencement of insolvency proceedings in a jurisdiction to which the debtor had no connection. Reservations were also expressed with respect to the possibility of commencing proceedings in a jurisdiction other than the centre of main interests (COMI) of the debtor concerned. By way of clarification, it was observed that what was being proposed did not involve any changes to the Model Law or abrogation of rights. Instead, what was sought was the ability to address a scenario where enterprise group members could identify the jurisdiction which would provide the best opportunity to successfully reorganize as a group solution, whilst avoiding a multiplicity of parallel insolvency proceedings and protecting the interests and expectations of creditors. Where those interests and expectations could not be protected to the satisfaction of creditors, it would remain open to them to commence individual proceedings against the group member of which they were a creditor based on, for example, the COMI of that debtor, and to rely on the Model Law for cross-border recognition and assistance, if required.

40. In further clarification, it was suggested that achieving a group solution in that fashion might involve the choice of an appropriate forum as a form of strategic planning; such a choice should not be seen as abusive forum shopping.

41. It was further suggested that that approach could also incorporate the notion that a group solution might be achieved without requiring proceedings to be commenced with respect to every insolvent group member, such as by treating the claims of foreign creditors in local proceedings where appropriate (so-called "synthetic measures"). Where that was not appropriate, proceedings for individual group members could be commenced. An important safeguard to be incorporated was the principle that creditors and other stakeholders of the relevant group member should be no worse off under a group solution than if a solution for the individual group member had been pursued (see paragraph 18 above). Some reservations were expressed as to the desirability of the approach described above.

42. In response to a concern that it would be difficult for creditors to evaluate whether they might be better off under a group solution than under proceedings commenced with respect to the group member of which they were a creditor, it was observed that nothing in the group solution approach sought to abrogate creditors' rights. Moreover, the burden of proving that the group solution was the best option would be on the party proposing it.

43. An additional clarification provided was that no proposal was being made that involved stripping the State, in which a group member might have its COMI, of its jurisdiction over that group member.

44. After discussion, the Working Group agreed that the appropriate foundation for this work was the Model Law and the Legislative Guide (parts one and two), but because enterprise groups were not specifically covered in either of those texts, more work was needed to address enterprise groups and to identify areas that might require special treatment. On the question of whether insolvency proceedings could be commenced without an appropriate connection to the commencing jurisdiction, there was clear agreement in the Working Group that this was not possible. Other issues identified for future consideration with reference to the scenario in paragraph 4 of A/CN.9/WG.V/WP.124[3] included:

(a) Appropriate protection of the interests of C's creditors located in country Y, where C was subject to proceedings in country Z;

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[3] Insolvency proceedings for enterprise group members A and B commence in country Z. A is the parent company of the enterprise group. Creditors are seeking to commence proceedings against group members C and D in country Y.

(b) The connection required in order for proceedings concerning group member C to commence in country Z;

(c) Treatment of the situation where, notwithstanding that group member C was participating in a group solution in country Z, there was a possibility that proceedings could be commenced in a number of other jurisdictions;

(d) The actions available to the court in country Y with respect to the proceedings in country Z, including recognition of those proceedings and commencement of local proceedings;

(e) Treatment of the situation where the proceedings commenced in country Y were main proceedings, which would typically take precedence over the proceedings concerning C in country Z; and

(f) The factors that might be relevant to the decision of the court in country Y to commence proceedings.

45. There was agreement that exceptions to recognition on the basis of COMI and establishment under the Model Law might be envisaged for the enterprise group context in limited circumstances, but that criteria for the scope and application of such exceptions would need to be established. Two examples provided were: (a) a situation where no creditors requested commencement of insolvency proceedings at the COMI of the debtor, but were notified of proceedings taking place elsewhere; and (b) where the court of the COMI jurisdiction declined to exercise jurisdiction in favour of proceedings taking place elsewhere based, for example, on criteria along the lines of paragraph 32 of A/CN.9/WG.V/WP.124. As an alternative to (b), the court of the COMI jurisdiction might commence local proceedings and suspend their continuation, pending the outcome of the foreign proceeding; appoint a creditor representative to participate in the foreign proceedings; and, in taking those actions, the court should satisfy itself that creditors would not be worse off under the foreign proceedings than if a local proceeding had been commenced and that creditors had been, and would continue to be, informed about the foreign proceedings. Another suggestion was that a factor additional to the list provided in paragraphs 144 to 147 of the Guide to Enactment and the Interpretation of the Model Law for determining COMI in the group context might be membership in an enterprise group.

3. Relief

46. The Working Group proposed a number of forms of relief additional to those provided in the Model Law that might be required in the group context. Those might include, in respect of proceedings in country Y:

(a) Limiting any stay to realization of assets rather than commencement or continuation of those proceedings in country Y;

(b) Limiting the number and type of creditors permitted to apply for commencement of those proceedings, for example, to certain classes of privileged creditors and those with rights in rem in country Y;

(c) Permitting transfer of assets to the proceedings commenced in country Z;

(d) Appointing a person to represent the creditors of the proceedings commenced in country Y in the proceedings commenced in country Z; and

(e) Requiring information to be provided to creditors in their own language.

47. Other forms of relief to be added might include the ability to recognize, in the primary proceeding in country Z, the priority of foreign creditors' claims determined in accordance with applicable law and pay them in accordance with that priority. With respect to the possible extension of any stay to include solvent group members, it was suggested that if that possibility were to be included in draft provisions, clear criteria would be required. Reference was made to the proposed revisions to the European Insolvency Regulation referred to in paragraph 22 of A/CN.9/WG.V/WP.124 and the conditions that would apply to application of the stay discussed in that paragraph, in particular, the need for proposal of a reorganization plan.

48. The concern was expressed that at any point in time before presentation of such a reorganization plan, it would be difficult for the court in a secondary jurisdiction, such as country Y, to have sufficient information to be able to assess the likelihood of success of that plan and thus whether it was appropriate to commence secondary proceedings. In response, it was suggested that in such circumstances, the proceedings in country Y could be commenced and a provisional stay ordered. The continuation or lifting of that stay could be determined as and when further information concerning the proceeding in country Z was available. It was further suggested that since the burden of proof belonged to the party seeking to commence the primary proceedings in country Z, the court in country Y could commence secondary proceedings until the success of the primary proceedings in country Z could be proven. Another concern related to the treatment of concurrent proceedings, noting that the Model Law included provisions on that point with respect to individual debtors. There was agreement that those issues would need to be further considered.

49. Reference was made to the possibility of recognition or approval of post-commencement finance granted in another jurisdiction and the priority accorded to it, as discussed in paragraphs 36 to 38 of A/CN.9/WG.V/WP.124. A question was raised as to whether that would be permissible under the Model Law. A further observation concerned the importance of such recognition and approval, without which the availability of post-commencement finance was likely to be limited.

4. Cooperation and coordination

50. The Working Group reiterated the importance of cooperation and coordination in the group context. It was noted that although the Model Law had been used in a number of cases to facilitate coordination and cooperation between multiple proceedings concerning group members, a flexible and liberal interpretation had been required; more explicit provisions would be needed in a group context. It was observed that part three of the Legislative Guide and Chapters IV and V of the Model Law provided a starting point for developing legislative provisions. Further consideration could be given, for example, to developing procedural coordination and the concept of a coordinating court in the cross-border context, as well as expanding the forms of cooperation listed in article 27 of the Model Law.

51. It was observed that it might be useful to elaborate the types of cross-border scenario that might occur and to consider the types of cooperation and coordination required in each case. The scenarios would include, for example: (a) a single proceeding concerning multiple group members; (b) multiple proceedings in different jurisdictions concerning different group members; and (c) a single proceeding concerning multiple group members in which the claims of other group members were treated in accordance with applicable foreign law (so-called “synthetic proceedings”).

5. Other issues

52. Issues raised for consideration included: (a) identification of parties, including creditors and other stakeholders, that should be permitted to participate in group proceedings and whether or not that participation should be facilitated by appointment of a representative; (b) questions of standing, particularly in concurrent proceedings; (c) voluntary participation of solvent group members, as well as creditors and other stakeholders of those solvent group members, in reorganization proceedings (noting paragraph 152 and recommendation 238 of part three of the Legislative Guide); (d) difficulties associated with appointment of a single or the same insolvency representative to different group members; and (e) balancing inclusive participation with the need for urgent action.

VI. Recognition and enforcement of insolvency-derived judgements

53. The Working Group commenced its discussion of this topic on the basis of document A/CN.9/WG.V/WP.126. As a preliminary point, it was noted that rules on

both recognition and enforcement might not be required, as enforcement was often subject to local rules and not all judgements would necessarily require enforcement.

A. Judgements to be covered by a recognition and enforcement regime

54. The Working Group considered how different types of judgement might be analysed in order to identify those that could be considered to be insolvency-derived judgements. Various approaches were suggested, including developing a list of the types of judgement to be considered, such as indicated in paragraph 17, which outlined a general approach, and paragraphs 21 and 22 of A/CN.9/WG.V/WP.126, which indicated the approach adopted under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the Insolvency Regulation). It was noted in respect of the European Union, that judgements could be enforceable under regimes additional to the Insolvency Regulation (e.g. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters).[4] It was observed that any approach adopted by the Working Group should be reconcilable with existing international rules and conventions and the recognition and enforcement of judgements more generally, as well as with ongoing work in other international organizations. It was further observed that development of a draft instrument on this topic should take into account progress of the work on enterprise groups.

55. Responding to the idea of providing a list, various proposals were made with respect to the manner in which judgements might be categorized in order to determine what might be an insolvency-derived judgement. One proposal suggested the following judgements that in substance provided an enforceable remedy that was consistent with fundamental principles of creditors' rights: (a) judgements that emanated from a court of competent jurisdiction; (b) judgements that respected statutory priority schemes; (c) judgements that recognized legitimate claims of creditors; and (d) judgements that respected the rights of insolvency representatives (or their assignee) to pursue reviewable transactions.

56. It was suggested that another way of approaching the different types of judgements might be to focus, firstly, on those that formed part of the insolvency proceedings (that is, arising after commencement of those proceedings), acknowledging that different States might take different approaches to that question, and secondly, on those arising from separate actions that might be taken by the insolvency representative, by creditors or by third parties. In the first category, the focus would be on the collective nature of the proceedings as supervised by the court. Those types of judgements might be subdivided into procedural orders, such as obtaining a stay, participatory judgements concerning, for example, recognition and admission of claims and restorative orders such as those related to avoidance of pre-commencement transactions. In the second category, the role of the court, questions of due process, public policy and, possibly, reciprocity would need to be evaluated.

57. Additional issues to be considered in identifying the judgements that formed part of the insolvency proceedings could, subject to thorough examination, include: (a) decisions that could not have been taken without the commencement of insolvency proceedings; (b) whether the claim in question had a basis in law related to insolvency (as distinct from contract or tort law); (c) judgements that related to the collective resolution of financial distress including reorganization and liquidation; (d) judgements rendered as a result of a direct or natural outcome of, or as part of, the insolvency proceeding, even if handed down by a court other than the insolvency court, such as on the conduct and closure of the proceeding; (e) judgements rendered as a result of separate or individual adversary action between a plaintiff and a defendant, including causes of action that may have been assigned or sold to third parties; (f) judgements that involved a third party and had an effect on the insolvency estate, where the third party was neither a debtor nor a creditor; (g) judgements arising from a cause of action pursued by a creditor (with the approval of the court) where

[4] Available from http://curia.europa.eu/common/recdoc/convention/en/c-textes/2001R0044-idx.htm.

the insolvency representative had decided against pursuing that action; (h) orders or decrees that might not always be characterized as a final judgement but which might have a significant effect on the insolvent estate; and (i) the ancillary relief that might require recognition in order to successfully enforce a judgement (for example, equitable relief such as establishment of a constructive trust).

58. It was observed that some of the judgements discussed above would be enforceable in some jurisdictions under the existing provisions of the Model Law, while in others they would not. In some cases, that would involve questions of interpretation of the implementing legislation, as well as what was explicitly covered by the Model Law.

59. States were invited to provide information to the Secretariat in respect of types of judgement that in their jurisdictions might be considered insolvency-derived judgements.

60. As to the form of the draft instrument, it was suggested that, while it should build upon the provisions of the Model Law, it should nevertheless form a separate instrument that could be used by States that had not enacted legislation based on the Model Law. It might also serve to encourage further adoption of the Model Law.

61. A concern was expressed that difficulties associated with enforcement of certain judgements, for example, those relating to the discharge of the debtor or approval of a reorganization plan, currently existed and should be addressed in the draft instrument. Another issue was that it might be advisable to provide for severability so as to enable enforcement of only a part of a judgement in cases where grounds for refusal of other parts might exist; certain elements such as a punitive damages award might thus be excluded (as noted in paragraph 38 of A/CN.9/WG.V/WP.126).

62. After discussion, there was some agreement that, for the purposes of recognition and enforcement, judgements could be divided into three general categories: (a) those that were part of insolvency proceedings; (b) those that might be part of insolvency proceedings, but involved third parties, for example, judgements relating to avoidance of transactions and determination of property of the estate; and (c) other judgements. Development of a text for future consideration by the Working Group could be based on those categories.

B. Jurisdiction of the originating court

63. Several suggestions were made as to how this issue could be approached. One suggestion was that it could be considered in the context of grounds for refusal for recognition. Another suggestion was that for judgements that were a part of insolvency proceedings, the current Model Law structure, based on main and non-main proceeding, could be followed. For judgements that might be part of insolvency proceedings but involved third parties, a different concept of jurisdiction, such as domicile, might be required in order to ensure judgements emanating from proceedings that were neither main nor non-main could be recognized.

64. Various concerns were expressed with respect to the ability to recognize judgements from jurisdictions other than the location of main and non-main proceedings. One solution, it was suggested, would be to require a connection with the main insolvency proceedings so that the judgement would be enforceable in that jurisdiction.

C. Procedures for obtaining recognition and enforcement

65. It was stressed that speed and minimal formality were of key importance and should be borne in mind in designing the procedural requirements for seeking recognition and enforcement of judgements. With respect to the person who may apply for recognition and enforcement of a judgement, the Working Group agreed that the category should be broader than article 15 of the Model Law and could

include creditors, the plaintiff, the creditors' assignees or possibly shareholders, i.e. anyone with an interest in the judgement or who was a party to it.

66. In respect of documents to be produced, the Working Group agreed that they should include a certified copy of the judgement, translated if required, and possibly confirmation of the finality of the judgement and whether or not the relevant period for appeal had expired. It was suggested that information regarding notice and service of process might also be useful.

67. In terms of the decision of a court to recognize an insolvency-derived judgement, it was suggested that it should be possible without a hearing unless the judgement was challenged on the basis of the agreed grounds for refusal and there should be no review of the decision on the merits.

D. Grounds to refuse recognition

68. With respect to the grounds raised in paragraph 40, subparagraph (a) of A/CN.9/WG.V/WP.126, it was agreed that only judgements that were final and enforceable should be covered by the draft instrument. With respect to paragraph 40, subparagraph (b) of the working paper, it was agreed that public policy, fraud, lack of due process and failure to provide adequate notice should be included as separate grounds for refusal. With respect to public policy, concern was expressed that it should be interpreted narrowly. Given the difficulty of reaching consensus on uniform interpretation of the notion of public policy, it was suggested that material on interpretation should be included in any guide to enactment of the draft provisions, such as provided in paragraphs 101 to 104 of the Guide to Enactment and Interpretation of the Model Law.

69. With respect to paragraph 40, subparagraphs (c) and (d) of A/CN.9/WG.V/WP.126, it was observed that care needed to be taken in respect of the manner in which such exceptions might be drafted to avoid unintended effects. The question of tax claims and other issues referred to paragraph 42 of the working paper was raised; it was generally observed that such claims might not be recognized or enforced.

70. Additional grounds for refusal might include circumstances: (a) where the court had doubts about the integrity of the originating court; (b) where the originating court lacked or had insufficient jurisdiction over the defendant; and (c) in which there was abuse of process and the administration of justice was brought into disrepute. It was also suggested that instead of restricting recognition to judgements originating from a main or non-main proceeding, recognition could be refused if it would hinder the administration of the cross-border insolvency of a debtor.

71. Recalling the decision taken in respect of the Model Law with respect to reciprocity, the Working Group agreed that it might be desirable to take a similar approach and not include such a requirement in the proposed text.

E. Other matters

72. In terms of other matters for inclusion in the new instrument, the Working Group agreed that articles 4 and 19 of the Model Law might be relevant, with article 4 serving as a signpost for those States that might wish to limit the courts in which applications for recognition and enforcement of foreign insolvency-derived judgements might be considered. As an alternative, determination of the competent court could be left to the person seeking recognition and enforcement of the judgement.

73. A suggestion was made that in developing this new instrument, regard should be had to some of the guiding principles outlined in the context of the work on enterprise groups. However, it was cautioned that such consideration should not be a first priority, with the initial focus being upon resolving more fundamental questions.

74. The Working Group agreed that the instrument should be developed on a stand-alone basis, as opposed to forming part of the Model Law. Nevertheless, it was agreed that the Model Law would provide the appropriate context for the new instrument.

75. A question was raised with respect to treatment of competing judgements. It was suggested that application of the res judicata principle should provide an appropriate solution. A related issue concerned the manner in which judgements arising from what might be considered “competing” insolvency proceedings might be treated.

B. Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups work

(A/CN.9/WG.V/WP.124)

[Original: English]

Contents

Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues that would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed.

2. Those issues agreed by the Working Group as establishing the outline for its future work were discussed at its forty-fifth session in April 2014. They form the basis of this working paper, which considers those issues in the context of a possible legislative regime to facilitate the conduct of cross-border insolvency proceedings affecting multiple members of an enterprise group. That context is intended to provide a means of connecting the various issues discussed at the forty-fifth session of the Working Group and serve as a starting point for discussion at the forty-sixth session. The form such a regime might take, for example, model law or model legislative provisions or additional guidance on the implementation and interpretation of existing provisions, is a question to be decided by the Working Group. It might be borne in mind, however, that adding further material to, or changing the approaches adopted in, part three of the Legislative Guide, which was completed only in 2009, might require appropriate justification, such as by reference to developments or changes in insolvency practice.

I. The goals of a cross-border insolvency regime for groups

3. At the outset, it might be helpful to identify some of the goals of a regime to facilitate the conduct of insolvency proceedings affecting multiple group members. One approach might be to follow the structure of the UNCITRAL Model Law and create a legislative regime for access, recognition, relief and cooperation, to address insolvency proceedings affecting different debtors that are connected by membership

of the same enterprise group. Such a regime might be extended in the group context to include provisions on:

(a) Identifying the jurisdiction(s) in which insolvency proceedings for the insolvent group members might be commenced;

(b) Facilitating participation of multiple members in a single proceeding or a coordination proceeding, possibly by way of voluntary submission to jurisdiction, and extending procedural coordination to enterprise groups;

(c) Limiting the number of insolvency proceedings that commence with respect to group members;

(d) Permitting voluntary participation of solvent group members in the proceedings concerning insolvent members, particularly when those proceedings are for reorganization;

(e) Appointing a limited number of insolvency representatives, as recommended in part three of the UNCITRAL Legislative Guide;

(f) Coordinating reorganization plans, as recommended in part three of the UNCITRAL Legislative Guide; and

(g) Recognizing post-commencement finance granted in another jurisdiction.

II. Key elements of a group regime

4. A simple scenario might be helpful to structure the discussion on these key elements:

> Insolvency proceedings for enterprise group members A and B commence in country Z. A is the parent company of the enterprise group. Creditors are seeking to commence proceedings against group members C and D in country Y.

A. Access[1]

5. The first issue might relate to the provision of access to foreign courts for purposes of requesting recognition and relief.

6. The Working Group agreed at its forty-fifth session[2] that different rights of access might be required depending on the nature of the insolvency proceedings affecting the group. Article 9 of the UNCITRAL Model Law refers to access for a foreign representative. In the group context, in accordance with Model Law, article 2 (d), access might be provided to the insolvency representative appointed to insolvency proceedings concerning group member A to make applications with respect to A or other group members, such as B, particularly where B is participating in an insolvency solution for the group as a whole. Access might also be provided to some other authorized person, such as the representative of a solvent group member that is participating in insolvency proceedings concerning group members (see paras. 58 and 61-63 below).

7. Access for foreign creditors is addressed in article 13 of the Model Law and is limited to the access provided to local creditors. In the group context, the Working Group agreed that access for foreign creditors might only be appropriate in specific circumstances.[3] One example given was where creditor claims were to be treated "synthetically" in insolvency proceedings conducted in a different jurisdiction (see

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[1] UNCITRAL Model Law, articles 9 and 13, Guide to Enactment and Interpretation paras. 25-28, 108 and 118; UNCITRAL Legislative Guide, part three, recommendation 239(a) and commentary, chapter III, paras. 11-13.

[2] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, para. 18.

[3] Ibid., para. 19.

paras. 27-29 below). This situation might need to be distinguished from more general issues of access, such as to information, discussed in paragraphs 56-58 below, where greater, rather than more restricted, access might be appropriate in the group context.

8. The Working Group also suggested that group members might have access analogous to that of creditors under the Model Law;[4] the Working Group might wish to consider whether, in many situations, it might be sufficient to allow access for the foreign representatives of those members and to the representatives of solvent members.

B. Recognition of foreign proceedings[5]

9. Recognition under the UNCITRAL Model Law focuses upon insolvency proceedings commenced with respect to an individual debtor and is based upon whether those proceedings commenced at the location where the debtor had its centre of main interests (COMI) or an establishment at the time proceedings commenced.[6] The resulting status of the recognized proceeding, as either main or non-main (see Model Law, article 17), is linked directly to the relief that can be provided to the foreign proceeding. This framework might be used in the group context and possibly extended to provide types of relief additional to those available under articles 20 and 21 of the Model Law (relief is discussed below).

10. Preliminary questions to consider with respect to recognition of insolvency proceedings involving different group members might include the purpose for which recognition could be sought and the basis upon which it might be granted.

1. Purpose of recognition

11. Recognition in other jurisdictions (including country Y) of the proceedings concerning A and B commenced in country Z might be sought to achieve several outcomes. These outcomes might focus on limiting the number of proceedings commenced with respect to all group members and seeking relief and assistance to deal with assets and affairs of the various group members in different jurisdictions.

2. Basis of recognition: status of the proceedings in country Z — use of the distinction between main and non-main proceedings

12. A difficult question for consideration in the group context concerns the basis on which proceedings concerning group members might commence and thus ground an application for recognition.

13. The UNCITRAL Model Law criteria of COMI and establishment can be applied in the enterprise group context for each individual group member. Several cases concerning the cross-border reorganization of enterprise groups have been concentrated in a limited number of jurisdictions, based upon courts in those jurisdictions finding that most, if not all, of the group members had their COMI in those jurisdictions. In the scenario outlined above, the proceedings for A and B might have commenced in country Z on the basis that country Z is the COMI of those two group members, determined in accordance with the factors indicated in the Guide to Enactment and Interpretation (paras. 145-147). Those proceedings might be recognized under the Model Law as main proceedings, with the applicable effects. Any local proceedings that might be commenced in country Y or other jurisdictions for A and B after recognition of the proceedings in country Z would be non-main proceedings and subject to the provisions of chapter V of the Model Law, e.g. under article 28, those proceedings would be limited to the assets located in that State or that, for reasons of cooperation and coordination, should be administered in that State.

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[4] Ibid.

[5] UNCITRAL Model Law, articles 15-24 and Guide to Enactment and Interpretation, paras. 29-34, 127-208; UNCITRAL Legislative Guide, part three, recommendation 239(b) and commentary, chapter III, paras. 11-13.

[6] See UNCITRAL Model Law, Guide to Enactment and Interpretation, paras. 157-160.

If the proceedings in country Z were based upon establishment, rather than COMI, they could still be recognized, but as non-main proceedings and the effects of recognition would be slightly more limited. The focus of relief in that case might be upon seeking to avoid or limit the commencement of main proceedings.

14. The COMI and establishment criteria could also be applied to analyse the situations of C and D. Thus, the representative of A and B may also seek to open main proceedings in country Z against group members C and D if it could be shown that the COMI of those subsidiaries or an establishment was located in country Z. The representative might then seek recognition of those proceedings (as main or non-main proceedings) in country Y.

15. The use of the Model Law approach in that way may, however, be insufficiently flexible to facilitate the insolvency treatment of enterprise groups and could lead to extensive litigation on issues of COMI. It may not always be possible to limit commencement to a small number of jurisdictions in which COMI (or establishment) might be found and for larger groups that restriction might prove to be an insurmountable obstacle to reorganization.

16. One suggestion has been to allow group members such as C and D to commence proceedings in country Z, irrespective of any connection they might have to that jurisdiction, on the basis that they are members of the same enterprise group as A and B. The goals of such a course of action would include facilitating the negotiation of an insolvency solution for the group as a whole, thus maximizing value for all group members; simplifying the conduct of the different insolvency proceedings, especially the need for coordination and cooperation, thus reducing costs and enabling the use of mechanisms such as procedural coordination [7] and appointment of the same insolvency representative.[8]

17. If such proceedings could be commenced in country Z, safeguards to protect the interests of creditors of C and D might include: ensuring that they are no worse off than they would have been had local proceedings commenced in country Y, providing an assurance that their claims will be dealt with in the proceedings in country Z, possibly by applying the law of country Y (see below, paras. 27-29) and recognizing in country Z the priorities of those claims under the applicable law. The court in country Z might be required to adhere to a standard such as that that approach was reasonable and rational in the best interests of the group and necessary to maximize the value of the group. A rebuttable presumption might be created to assist, for example, to the effect that commencement in country Z is reasonable. If not rebutted, those proceedings could be recognized elsewhere.

18. A number of factors might be identified as being relevant to the choice of country Z for commencement of the insolvency proceedings concerning A, B, C and D. Those might include that it is the COMI of one group member — in this case, the group parent A, but it need not necessarily be linked to the COMI of the parent, but rather to the COMI of at least one group member; country Z could be the location of the central administration of the group; the size and nature of the group makes the choice of country Z seem reasonable and not unexpected from a creditor's standpoint; or there is a significant and ascertainable connection between the part of the enterprise group involving group members A, B, C and D and country Z.

19. If recognition of the insolvency proceedings for A, B, C and D was required elsewhere, for example, to obtain relief, the relevant legislative regime would need to adopt a broader approach than the Model Law approach of recognizing proceedings only on the basis of COMI and establishment.

20. There are likely to be objections to such a course of action. Using the wording of the Guide to Enactment and Interpretation (para. 145), it could be said that commencing proceedings for C and D in country Z is not an outcome that would be readily ascertainable by creditors of C and D; their legitimate expectations would be

[7] UNCITRAL Legislative Guide, part three, chapter II, paras. 22-37, recommendations 202-207.
[8] Ibid., paras. 142-145, recommendations 232-233.

that in the event of insolvency, proceedings would be conducted in a different venue. There are jurisdictional issues concerning the basis upon which the courts of country Z could take jurisdiction over C and D absent a connection with country Z such as COMI, establishment or presence of assets and the basis upon which country Y and other jurisdictions might defer to the proceedings commenced in country Z.

C. Relief[9]

1. Introduction

21. At its forty-fifth session,[10] the Working Group noted that part three of the UNCITRAL Legislative Guide did not address the provision of relief in the international context and that the provisions of the UNCITRAL Model Law might be extended for that purpose. It was further noted, however, that a stay, of the kind automatically applicable under article 20 of the Model Law upon recognition of a foreign proceeding, was likely to be required in the group context for a slightly different purpose, that is, to limit the commencement of local proceedings and deter action by local creditors that might be detrimental to any solution being pursued for the group as a whole. Moreover, relief in a group context was likely to be based upon factors beyond those specified under the Model Law, involving different debtors in different jurisdictions connected by virtue of membership of the same enterprise group, rather than the assets and affairs of a single debtor.

2. Application of a stay in the group context: revision of the European Insolvency Regulation (EIR)[11]

22. An example of a stay available in the context of proceedings for enterprise group members is provided by article 42d of the draft revisions to the EIR. This article permits an insolvency representative appointed in insolvency proceedings commenced with respect to an enterprise group member to request, to the extent appropriate to facilitate the effective administration of the proceedings, a stay of any measure related to the realization of the assets in proceedings commenced with respect to any other group member, subject to certain conditions. These include that:

(a) A reorganization plan for all or some group members subject to insolvency proceedings has been proposed and has a reasonable chance of success;

(b) Such a stay is necessary in order to ensure the proper implementation of the plan;

(c) The plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and

(d) No group coordination proceeding has commenced (see paras. 45-46 below).

23. Before ordering the stay, the court is to hear the insolvency representative appointed in the proceedings to be affected by the stay. The initial stay is limited to three months, but can be extended for another three months subject to certain conditions. The court ordering the stay may require the insolvency representative

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[9] UNCITRAL Model Law, articles 20-21 and Guide to Enactment and Interpretation, paras. 35-39 and 176-195.

[10] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 27-29.

[11] European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings. References to the EIR in this paper are to the document entitled "Council of the European Union, Proposal by the Presidency as a compromise for adoption on 5-6 June 2014, Brussels, 3 June 2014" [10284/14 Add1, JUSTCIV 134; EJUSTICE 54; CODEC 1366] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [First reading] available at http://conflictoflaws.net/News/2014/06/Council-insolvency.pdf.

requesting the stay to take any measure (available under national law) necessary to protect the interests of creditors in the proceedings to be affected by the stay.

3. Relief that might be required in the enterprise group context

24. Types of relief that might be required in the group context, based upon the scenario outlined above, could include:

(a) A stay on commencement (or continuation) of insolvency proceedings concerning A and B in country Y;

(b) A stay on commencement (or continuation) of proceedings concerning C and D in country Y on the basis of a proposal that the claims of creditors of those two group members can be dealt with in the proceedings in country Z (see paras. 27-29 below);

(c) Commencement of local insolvency proceedings in country Y for C and D in cases where creditors' claims against C and D cannot be addressed in the proceedings in country Z. Commencement of the insolvency proceedings against C and D in the scenario above could be sought by an insolvency representative appointed in the proceedings concerning A and B. It will be recalled that under article 9 of the Model Law, recognition of the foreign proceeding or the foreign representative in order to commence a local proceeding is not required;

(d) The effects of recognition under article 20 of the Model Law and relief and assistance for the proceedings in country Z of the kind available under article 21 of the Model Law to deal with assets and affairs of A, B, C and D in country Y (and possibly other jurisdictions), including a stay of the right to enforce foreign security rights where global reorganization is proposed;[12]

(e) Extension of any stay to include solvent group members, if required;[13]

(f) Approval by a recognizing court of post-application and post-commencement finance approved elsewhere and the priority accorded to it (see paras. 36-38 below); and

(g) Approval by a recognizing court of the use of assets in the recognizing jurisdiction to secure post-commencement finance provided to a group member in a different jurisdiction.

25. Conflict may arise between different applications e.g. an application from local creditors to commence insolvency proceedings and from foreign insolvency representatives to stay that commencement. Possible factors to be considered by the court in deciding whether to commence local proceedings are identified below in paragraphs 31 and 32. A specific rule might be required to enable the local court to coordinate the different applications.

26. Notice of the local application would need to be provided to relevant group insolvency representatives. Safeguards for creditors similar to those applicable under article 22 of the Model Law are likely to be appropriate.

4. Addressing the claims of foreign creditors in local proceedings

27. At its forty-fifth session,[14] the Working Group expressed interest in exploring the use of so-called "synthetic" measures and how they might facilitate the conduct of enterprise group insolvencies. The following discussion attempts to address the issues raised by the Working Group.

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[12] UNCITRAL Legislative Guide, recommendation 46(b).

[13] See UNCITRAL Legislative Guide, part three, chapter II, paras. 39-46 and part two, recommendations 46, 48, 50 and 51.

[14] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 21-22.

(a) Examples of the use of so-called "synthetic" measures

28. In various cases involving the insolvency of enterprise group members under the EIR, the insolvency representatives of the main proceedings have offered, in order to minimize the commencement of secondary proceedings, to treat foreign creditors in the main proceeding as far as possible according to the creditors' local law. Examples include *In the matter of Collins & Aikman Europe, SA*,[15] *Re MG Rover Group Limited*[16] and *Re MG Rover Belux SA/NV*,[17] and *Re Nortel Networks SA*.[18] In some instances, the entitlement of the foreign creditors under the foreign law was greater than their entitlement under the law of the main proceedings. In each case, the court of the main proceeding approved the payment of those entitlements in accordance with the foreign law in order to achieve the purpose of the main proceedings.

29. These synthetic measures have been used in an enterprise group context where a group-wide solution is being devised or pursued in main proceedings (which may have commenced in a single jurisdiction) for multiple group members and the commencement of secondary proceedings for any of those group members in other jurisdictions would have adversely affected the achievement of that solution. Although used in a group context, these measures have been applied in respect of individual group members.

(b) Safeguarding the interests of local creditors in country Y

30. Provisions addressing the use of those types of measure might include firstly, safeguards for creditors, such as requiring that they should be no worse off as a result of treatment of their claims in the foreign proceeding than they would have been had a local proceeding commenced (unless creditors agreed to different treatment), and second, that those creditors could participate or be represented in the foreign proceeding. Where "no worse off" treatment could not be guaranteed, a local proceeding could be commenced. Notice of the application for the local proceeding would desirably be provided to the representative of the foreign proceedings, who might have some degree of control over the commencement of those local proceedings (see para. 35 below).

(c) Factors relevant to a decision to commence proceedings in country Y

31. Commencement of proceedings in country Y might be appropriate in the above scenario where, for example:

(a) "No worse off" treatment of the creditors of C and D cannot be assured in the proceedings in country Z;

(b) The law applicable to those claims in country Y cannot be applied in the proceedings in country Z;

(c) Claims in country Y are not of a purely monetary nature;

(d) Claims in country Y cannot realistically be treated in the proceeding in Z, because, for example, of the nature of the claim. Some claims, for example, might require some sanction by the courts of country Y;

(e) Priority claims in country Y will have a significant impact on the insolvency estates in the proceedings in country Z;

(f) There are irreconcilable differences between the insolvency law of country Z and the applicable law in country Y;

(g) The law of country Y offers conditions not available under the law of country Z, such as for termination of contracts or avoidance of claims that will benefit

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[15] [2006] EWHC 1343, [2006] BCC 861.
[16] Unreported, 8 April 2005.
[17] [2006] EWHC 2377.
[18] [2009] EWHC 206, [2009] BCC 343.

the global solution for the group or will assist achievement of the purposes of the proceedings in country Z; and

(h) The benefit of commencing proceedings in country Y will outweigh the disadvantages of commencing and coordinating multiple proceedings.

(d) Factors relevant to a decision to decline to commence proceedings in country Y

32. The court in country Y might decline to commence local proceedings where a variety of possible factors were present, such as that those proceedings:

(a) Lacked purpose (Appeal Court in *SAS Rover France*);[19]

(b) Would not improve the protection of stakeholder interests in country Y, which could be adequately protected in the proceedings in country Z (*SAS Rover France*);

(c) Would not improve the realization of assets located in country Y (*SAS Rover France*);

(d) Were not required to address claims or realization of assets in country Y;

(e) Would impede achievement of the purpose of the proceedings in country Z, e.g. reorganization, where the proceedings being sought in country Y were liquidation;

(f) Were not in the global best interests of the enterprise group as a whole; and

(g) Were opposed by the insolvency representative of the proceedings in country Z.

(e) Powers of the insolvency representative appointed in country Z

33. An insolvency representative appointed in country Z might require certain powers in order to address the claims of creditors from country Y (and possibly other jurisdictions) in the proceedings in country Z:

(a) The ability to seek to prevent or limit the commencement of proceedings in country Y (and possibly other jurisdictions), provided the interests of potential stakeholders in those proceedings could be adequately protected,[20] or to seek a stay should those proceedings commence;

(b) The right to be heard on any application for commencement of proceedings in country Y (and possibly other jurisdictions); and

(c) The ability to respect priorities applicable in country Y (and possibly other jurisdictions) where a group member has an establishment without local proceedings necessarily having to be commenced, to give appropriate assurances to creditors in country Y to that effect and make payments to those creditors that might be greater than strictly permitted under the law applicable to the proceedings in country Z.

34. With respect to any assurance that might be given by an insolvency representative to local creditors to achieve this "synthetic" treatment of their claims, the draft EIR revision[21] contains a number of provisions (article 28a) relating to the form in which that assurance should be given ("in writing"); the law applying to approval requirements; parties required to approve ("known local creditors"); legal effect of the undertaking ("binding on the insolvency estate"); provision of notice of the undertaking; measures to ensure compliance; challenges to distribution in

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[19] *SAS Rover France*, decision of the Court of Appeal of Versailles, 15 December 2005, available in French at www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000006947365&fastReqId=831989940&fastPos=3.

[20] Adequate protection of creditor interests is required by the UNCITRAL Model Law art. 22, Guide to Enactment and Interpretation, paras. 196-199.

[21] It should be noted that the proposed revisions to the EIR are based on maintaining the distinction between main and secondary (non-main) proceedings for individual enterprise group members.

accordance with the undertaking; and liability for damage resulting from non-compliance with the undertaking. The giving of an undertaking does not remove the right of local creditors to apply for the commencement of secondary proceedings, but does provide the basis for the local court not to commence those proceedings where it is satisfied that the general interests of local creditors are adequately protected (article 29a.2) by the undertaking. The foreign representative is entitled to be notified of any such request and must be given the opportunity to be heard. A stay of commencement of secondary proceedings may be granted for up to three months to enable negotiations between the debtor and creditors and other protective measures may apply to protect the interests of local creditors during the stay. A decision to commence secondary proceedings can be challenged by the foreign representative of the main proceedings.

35. Where local proceedings in country Y are required, the insolvency representative of the proceedings in country Z might need, in addition to powers of the type included as discretionary relief under article 21 or, following recognition, under articles 11, 12, 23 and 24 of the UNCITRAL Model Law, the following:

(a) The ability to control the commencement of proceedings in country Y (and possibly other jurisdictions) and determine whether and when such proceedings should be commenced and what type of proceeding they should be (e.g. liquidation or reorganization);

(b) The right to be notified of applications for commencement of such proceedings;

(c) The right to participate in meetings of creditors in country Y (and possibly other jurisdictions);

(d) The right to seek conversion of proceedings in country Y, e.g. from liquidation to reorganization, to assist achievement of the purpose of the proceedings in country Z;

(e) The ability to coordinate negotiation of a reorganization plan for A, B, C and D;

(f) The right to propose a coordinated reorganization plan in whichever jurisdictions approval of that plan was required; and

(g) The right to request any additional procedural measures under the law applicable to insolvency proceedings in country Y that might be necessary to promote the group reorganization.

5. Additional forms of relief: post-application and post commencement finance[22]

36. The provision of post-application and post-commencement finance in the enterprise group context is addressed in part three, chapter II of the UNCITRAL Legislative Guide, recommendations 211-216. Based on the recommendations included in part two of the Legislative Guide (recommendations 63-68), they deal with the issues relevant to provision of such finance between group members, including the relevant criteria to be considered, but do not address cross-border aspects.

37. At its forty-fifth session,[23] although broadly agreeing on the importance of post-application and post-commencement finance, the Working Group did not reach agreement as to how that topic should be approached in the cross-border context. One suggestion, to consider the provision of such finance in the context of relief, was agreed to be a good starting point. The relief sought might include, as noted in paragraph 24 (f) and (g) above, approval for, or recognition of, post-commencement finance granted in another jurisdiction and the priority accorded to it, as well as use

[22] UNCITRAL Legislative Guide, part three, recommendations 211-216 and commentary chapter II, paras. 47-51 and 55-74.

[23] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 30-31.

of assets in the recognizing jurisdiction to secure post-commencement finance provided to a group member in a different jurisdiction. In considering whether such relief should be granted, the court might take into consideration, in addition to the criteria included in recommendation 212 of the Legislative Guide, issues such as whether the provision of finance balances group and individual member's interests, safeguards the global best interests of all group members taken together and protects the interests of local creditors.

38. The question of cross-border provision of finance was discussed in the context of the insolvency of financial institutions in document A/CN.9/WG.V/WP.109, paragraph 48. That paragraph refers to recital 22 of the draft European Commission directive (COM (2012) 280/3), which notes that the provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted under many national laws. Although those laws are designed to protect the creditors and shareholders of each entity, they do not take into account the interdependency of the entities of the same group or the group interest. The paragraph notes the measures included in the proposal, including the possibility of voluntary agreements drawn up and approved (in accordance with national laws) in advance of financial difficulties occurring. Chapter III, articles 16-22 of the proposal address the content and approval of financing agreements; conditions required to provide finance and the decision to provide finance; opposition to the provision of finance, as well as disclosure.

D. Cooperation and coordination[24]

39. Part three of the UNCITRAL Legislative Guide includes a number of recommendations that expand the cooperation provisions of chapter IV of the UNCITRAL Model Law for application in the enterprise group context. Those recommendations might be included in a legislative regime of the type being considered.

1. Extending the coordination and cooperation provisions of part three of the Legislative Guide to solvent group members

40. At its forty-fifth session,[25] the Working Group noted that in addition to extending access provisions to solvent group members, consideration might also be given to extending the provisions of part three, chapter III of the Legislative Guide on cooperation and coordination to include such group members or their representatives where they participate in an insolvency solution such as group reorganization. So, for example, recommendations on cooperation between courts and insolvency representatives might include representatives of solvent group members; similarly, recommendations on cooperation between insolvency representatives might be extended to include those representatives of participating solvent group members.

41. Consideration might need to be given to whether such recommendations should be drafted as broadly as recommendations 240-250 or whether such cooperation would only be relevant in specific circumstances and thus limited, for example, to issues directly involving or concerning the participating solvent group members.

2. Identifying a coordinating court

42. At its forty-fifth session,[26] the Working Group discussed the possibility of identifying a coordinating court that could play a role, for example, in promoting the negotiation and evaluating the feasibility of a reorganization plan for the group. It was suggested[27] that there should be a minimum connection between any chosen

[24] UNCITRAL Legislative Guide, part three, recommendations 240-250 and chapter III, paras. 14-40.

[25] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 23-25.

[26] Ibid., paras. 35-36.

[27] Ibid.

location and the group and that the choice should be rational (see paras. 17 and 18 above). Recommendations 240-245 of part three of the UNCITRAL Legislative Guide relating to cooperation by the courts would be relevant, as would recommendation 246 and 248 relating to cooperation between courts and insolvency representatives in the international context.

43. A coordinating court might be chosen on grounds similar to those suggested above in paragraph 18. Additional factors might include that that location is:

(a) Where viable post-commencement finance for the group reorganization is available; and

(b) Suitable for promoting and evaluating a coordinated reorganization plan (where the plan would be approved by the courts of the jurisdictions in which approval is required).

44. The coordinating court might be determined by other courts cooperating and coordinating their activities in keeping with principles of net global benefit for the group and protection of the interests of local creditors. In so doing, those courts may play a proactive role or simply take a permissive or hands off approach and defer to the coordinating court.[28]

3. Group coordination proceedings

45. The draft revisions to the EIR include the concept of a group coordination proceeding (articles 42d1-17) that can be started once insolvency proceedings concerning individual group members have commenced in order to coordinate those proceedings. The purpose of those provisions is to recommend a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies, in particular, measures to be taken in order to re-establish the economic performance and financial health of the group or any part of it; settlement of intra-group disputes concerning intra-group transactions; and avoidance actions and agreements between insolvency representatives of the insolvent group members (article 42d12). The revisions establish: pre-conditions for requesting the commencement of such a proceeding, persons who may request commencement, procedures to be followed, choice of the coordinating court, procedures for objecting to inclusion of group members in the proceeding, opt-in subsequent to commencement, group coordination plans, costs and distribution.

46. Those provisions reflect and extend recommendations 202-210 of part three, chapter II of the UNCITRAL Legislative Guide concerning procedural coordination of insolvency proceedings affecting group members, where those proceedings are conducted in the same jurisdiction. As suggested above, procedural coordination could be relevant in the situation where multiple group proceedings are commenced in country Z.

4. Appointment of a group coordinator

47. Part three, chapter III, paragraph 37 of the Legislative Guide discusses the possibility of appointing a court representative to coordinate multiple international proceedings in the cross-border group context. It outlines the possible role such a person might play, but does not address how that person might be appointed or which court might make the appointment. It notes, however, that that person should be considered neither an additional insolvency representative nor a substitute for an existing insolvency representative. It also notes that the appointing court will typically outline the terms of the person's authority and the extent of their powers to act. No specific recommendations are included on this point in part three, although the possibility of such an appointment is mentioned in recommendation 241(c), dealing with cooperation to the maximum extent possible involving courts, which mirrors the language of article 27(a) of the UNCITRAL Model Law.

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[28] Deferral is discussed in the UNCITRAL Practice Guide, chapter II, paras. 18-20 and chapter III, paras. 75-78.

48. As noted above, the EIR draft revisions contain provision for appointment of a group coordinator in the context of a group coordination proceeding. The coordinator must be a person eligible to be appointed as an insolvency representative, a person other than one appointed in the individual proceedings participating in the group coordination, and have no conflict of interest in respect of the group members participating in the group coordination, their creditors or their insolvency representatives. There appears to be no requirement for the coordinator to be connected to the jurisdiction of the court chosen under draft article 42d6 to have exclusive jurisdiction over the group coordination.

49. The EIR revisions address proposal and appointment (including revocation) of the coordinator; tasks and obligations of the coordinator; cooperation between the coordinator and the insolvency representatives of group members and costs.

50. The coordinator's obligations (article 42d12 (1)) are to:

(a) Identify and outline recommendations for the coordinated conduct of the insolvency proceedings;

(b) Propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for:

(i) The measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;

(ii) The settlement of intra-group disputes as regards intra-group transactions and avoidance actions; and

(iii) Agreements between the insolvency representatives of the insolvent group members.

51. The coordinator may also (article 42d12 (2)):

(a) Be heard and participate, in particular by attending creditors' meetings, in any of the insolvency proceedings opened with respect to any member of the group;

(b) Mediate any dispute arising between two or more insolvency representatives of group members;

(c) Present and explain the group coordination plan to the persons or bodies required to receive such a report under applicable national law;

(d) Request information from any insolvency representative in respect of any group member where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the insolvency proceedings concerning group members; and

(e) Request a stay for a period of up to six month of the proceedings opened with respect to any group member, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the insolvency proceedings for which the stay is requested, or request the cessation of any existing stay. This request shall be made to the court that opened the insolvency proceedings for which a stay is requested.

52. Recommendations on coordination are specifically prohibited from including consolidation of insolvency proceedings or insolvency estates (article 42d12 (3)) and the coordinator's rights and tasks extend only to those group members participating in the group coordination (42d12 (4)).

E. Other issues

1. Participants: Insolvency representatives[29]

53. At its forty-fifth session,[30] the Working Group noted recommendation 251 of part three of the UNCITRAL Legislative Guide and considered ways in which it would be possible to achieve the appointment of the same or a single insolvency representative to all group members subject to insolvency proceedings. Where those proceedings commence in the same jurisdiction, such an appointment should be possible in accordance with recommendation 251. When those proceedings commence in different jurisdictions, additional solutions would be required. One approach might be for courts to recognize licensed foreign practitioners for appointment in their jurisdiction. A key concern noted by the Working Group was in respect of regulatory issues, particularly of a disciplinary nature, that were likely to arise if an insolvency representative were to be appointed outside the jurisdiction in which they were licensed or regulated and whether that regulatory regime could extend to activities undertaken in a foreign jurisdiction.

54. A different approach might be to consider appointment of a co-insolvency representative in jurisdictions where local proceedings are required or, as envisaged in article 21(1)(e) of the UNCITRAL Model Law as a form of discretionary relief, designation by the recognizing court of a person to administer or realize assets located in the recognizing jurisdiction. Consideration might be given to whether that designated person could act at the direction of a lead insolvency representative, to ensure coordination of the proceedings and enable that insolvency representative to have some degree of control over the various proceedings concerning group members (see paras. 45-52 above on group coordination proceedings and coordinators).

55. The Working Group also noted the need to maintain the possibility of a debtor in possession, which is included in the definition of a foreign representative in the Model Law, continuing in that position in the group context.

2. Participants: Creditors[31]

56. At its forty-fifth session,[32] the Working Group generally agreed on the desirability of strengthening the participation of creditors and interested parties in insolvency proceedings concerning group members. Recommendations 126-136 of the UNCITRAL Legislative Guide address the right to participation; voting; convening of meetings of creditors; creditor representation; and committee membership, rights and functions; employment of professionals by a creditor committee; liability of creditor committees; and removal or replacement of members of a creditor committee. Issues of confidentiality are addressed in recommendation 111.

57. Additional issues that might need to be addressed in the group context could include the following, some of which are noted in recommendation 204 of part three of the Legislative Guide on procedural coordination:

(a) Access to initial information on location, types and ownership of assets and asset value;

(b) Reporting on the status of cases, significant dispositions of assets and payment of claims;

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[29] UNCITRAL Legislative Guide, part three, recommendations 251-252 and chapter III, paras. 43-47.

[30] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, para. 32.

[31] UNCITRAL Legislative Guide, recommendations 126-136 and commentary, part two, chapter III, paras. 75-115.

[32] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 33-34.

(c) Cooperation between insolvency representatives and creditor committees and/or creditor representatives;

(d) Cooperation between creditor committees in concurrent insolvency proceedings concerning enterprise group members;

(e) Creditor access to courts or insolvency representatives to assert claims;

(f) Rationalization of claims procedures;

(g) Streamlining resolution of creditor disputes; and

(h) Issues of the law applicable to creditor committees.

58. Some of these issues might be addressed by:

(a) Establishing, in reorganization and possibly also liquidation, a group creditor committee to facilitate provision of notice, access to information and streamline decision-making, subject to safeguards to prevent domination by powerful creditors;

(b) Appointing a representative for creditors of each group member;

(c) Appointing a representative for solvent group members involved in group reorganization; and

(d) Establishing a committee of all group representatives, including those of solvent group members, to facilitate coordination, work with creditors, negotiate reorganization plans, coordinate treatment of foreign creditors' claims in the main proceedings, and discuss post-commencement finance.

3. Reorganization[33]

59. At its forty-fifth session,[34] the Working Group considered various scenarios involving reorganization and focused on identification of the (lead) coordinating court and the role it could play in any group reorganization solution — this issue is discussed in paragraphs 42-44 above.

(a) Coordinated reorganization plans

60. The application of recommendation 237 of part three of the UNCITRAL Legislative Guide in the cross-border context might be considered.

(b) Inclusion of solvent group members

61. With respect to the participation of solvent group members in a reorganization plan, the Working Group generally agreed that recommendation 238 of part three of the Legislative Guide should be extended to the international context and the scope broadened to encompass more in terms of cooperation and coordination, for example, in the context of the liquidation of group members on a going concern basis.[35]

62. Additional provisions might address how that participation could proceed and how the interests of the solvent group member might be protected. Mention is made in para. 58(c) and (d) above of enabling solvent group members involved in a group reorganization to appoint a representative that might, for example, participate in a committee of representatives of both insolvent and solvent group members to facilitate coordination, work with creditors, negotiate reorganization plans, coordinate treatment of foreign creditors' claims in the main proceedings, and discuss post-commencement finance. Provisions addressing cooperation between courts and insolvency representatives and between insolvency representatives (recommendations 240-250) might be extended to include representatives of those

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[33] UNCITRAL Legislative Guide, part three, recommendations 237-238 and commentary, chapter II, paras. 146-152.

[34] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 35-37.

[35] Ibid., paras. 24-25.

solvent group members, who might be given standing in the insolvency proceedings concerning group members, to the extent considered appropriate, to protect the interests of the solvent group member participating in any group-wide solution.

63. One area of particular concern to solvent group members would be ensuring the confidentiality of commercially sensitive information, particularly in the context of any disclosure statements provided to support a group reorganization plan. Some of the measures taken to ensure the protection of creditors of insolvent group members might also be relevant to the creditors of participating solvent group members, although consideration and protection of those creditors' interests should be taken into account in the decision to participate in the group insolvency proceedings in the first instance.

C. Note by the Secretariat on directors' obligations in the period approaching insolvency: enterprise groups

(A/CN.9/WG.V/WP.125)

[Original: English]

Contents

Introduction

1. Part three of the UNCITRAL Legislative Guide on Insolvency Law deals with the treatment of enterprise groups in insolvency and provides background on the nature of enterprise groups; reasons for conducting business through enterprise groups; what constitutes an enterprise group by reference to concepts such as ownership and control; and regulation of enterprise groups. Part four of the Legislative Guide addresses the obligations of directors in the period approaching insolvency, discussing issues associated with directors' obligations in that period and, in particular, the rationale for imposing obligations specific to that period by way of the operation of insolvency, rather than corporate, law. Neither part three nor part four addresses the specific issues that might affect directors' obligations when they are directors of one or more enterprise group members.

2. At its forty-fourth session (2013), Working Group V (Insolvency Law) agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group whose task would be to examine how part four of the UNCITRAL Legislative Guide could be applied in the enterprise group context and any additional issues (such as conflicts between a director's obligations to its own company and the interests of the group and issues of governing law) that might need to be addressed. The informal expert group was to report back to the Working Group no later than the session in the second half of 2014 (A/CN.9/798, para. 23).

3. This working paper has been prepared by the Secretariat following consultations with an informal expert group as requested by Working Group V. It builds upon the

relevant recommendations of part four of the UNCITRAL Legislative Guide (recommendations 255-266) and indicates the manner in which those recommendations might be modified to specifically address directors' obligations in the enterprise group situation. The focus is upon recommendations 255 and 256 which outline the obligations to be met and the reasonable steps to be taken to satisfy those obligations in the group context. The proposed modifications to those recommendations could be accompanied by relevant explanatory commentary to assist the reader in understanding the modified recommendations and how they might be applied. Such explanatory material has not been included in this paper, but could be drafted once the Working Group has decided upon its approach to preparing a draft text on this topic.

4. Recommendations to which modifications are not proposed are not included in the recommendations set forth below, but would apply to the group context (i.e. recommendations 257 and 259-266). The appropriateness of recommendation 258 as drafted for the group context is raised. As to terminology, the word "company" as used in part four of the Legislative Guide has been replaced with the words "enterprise group member" as appropriate.

I. The nature of the obligations: recommendations 255-256 (EG)

A. Draft recommendations

1. Purpose of legislative provisions

[These provisions address the situation of a company facing imminent or unavoidable insolvency where it is a member of an enterprise group.]

The purpose of these provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders [of enterprise group members];

(b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;

(c) To provide appropriate remedies for breach of those obligations, which may be enforced after insolvency proceedings have commenced;

[(d) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that group member, including in situations where they are also responsible for making decisions concerning the management of other group members]; and

[(e) To permit an enterprise group member to be managed, where appropriate, in a manner that [is ultimately in the best interests of the enterprise group] [will maximize value in the enterprise group] [and of the group member as part of that enterprise group] [whilst ensuring that the creditors of that group member and its other stakeholders are no worse off than if a solution for the individual group member had been pursued]].

Paragraphs (a)-(e) should be implemented in a way that does not:

(a) Adversely affect successful business reorganization [of the enterprise group] [of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole, the position of the group member in the enterprise group and the degree of integration between group members];

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or

(c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

2. Content of legislative provisions

The obligations

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders [of the enterprise group member [of which they are a director] and of other group members] and to take reasonable steps:

(a) To avoid insolvency; and

(b) Where it is unavoidable, to minimize the extent of insolvency [and its impact on creditors and other stakeholders of the enterprise group member and of other group members] [, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members].

256 (EG). For the purposes of recommendation 255 (EG), reasonable steps might include, [in addition to the steps outlined in recommendation 256]:

(a) Evaluating the current financial situation of the enterprise group member [and of the enterprise group] [to ascertain whether more value might be preserved or created by considering a solution for the enterprise group as a whole];

(b) [Considering the financial and other obligations of the group member to other group members, which transactions should be entered into with other enterprise group members, and possible sources and availability of post-commencement finance];

(c) Calling a shareholder meeting [with the parent and other enterprise group members to discuss how to structure the analysis of the insolvency solution for the individual group member and the enterprise group as a whole, taking into account issues of applicable law];

(d) [Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under an insolvency solution for the enterprise group as a whole and assisting the implementation of such a solution];

(e) Being independently informed as to the current and ongoing financial situation of the enterprise group member [and of the enterprise group];

(f) Seeking professional advice, including [independent] insolvency or legal advice;

(g) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[1] [where organized for the enterprise group as a whole or for several enterprise group members];

(h) Considering the structure and functions of the business [in the context of the enterprise group] to examine viability and reduce expenditure;

(i) Not committing the enterprise group member to the types of transaction that might be subject to avoidance unless there is an appropriate business justification [for entering into such transactions] [, which could include a business justification in the context of the enterprise group]; and

(j) Commencing or requesting the commencement of formal reorganization or liquidation proceedings. [Where formal proceedings are to be commenced,

[1] Legislative Guide, part one, paras. 2-18.

considering the court in which they should be commenced, whether a joint application[2] with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[3]]

B. Notes

(a) Purpose clause

5. This purpose clause is based on the purpose clause for recommendations 255 and 256 of part four of the UNCITRAL Legislative Guide. Proposed additions, shown in square brackets, are intended to introduce the impact the enterprise group context might have on the nature of the obligations and the manner in which they can be discharged. Language from recommendations 214 and 217 of part three of the Legislative Guide has been added to draw attention to that context. While the primary obligations of directors relate to the individual group member to which they have been appointed, there are additional factors that might need to be taken into account, for example, the position of the group member in the enterprise group, the degree of integration between group members, and the possible benefits of maximizing the value of the enterprise group and of promoting an insolvency solution for the group as a whole.

(b) Recommendation 255 (EG)

6. Recommendation 255 refers directly to the obligations of the directors of the group member that is imminently or unavoidably facing insolvency. In the enterprise group context, the obligations to avoid or, particularly, to minimize the impact of insolvency may need to take account of factors beyond the particular group member. There may be circumstances, for example, where the best way of preserving the value of the group member and the interests of its creditors and other stakeholders will be to contribute to and participate in a broader solution for the enterprise group as a whole (or some part of the group). In such a case, a director's primary obligations remain to the group member to which they have been appointed and they will need to ensure that their creditors and other stakeholders are no worse off under the solution adopted for the group as a whole than they would have been had a solution for the individual group member been pursued. Those ideas are included in the modified recommendation; specific steps to be considered are included in recommendation 256 (EG). Situations likely to give rise to conflicting obligations, such as where a director of the group member imminently or unavoidably insolvent is also a director of another group member or holds an executive or management position in another group member, is addressed in a new draft recommendation (see below).

(c) Recommendation 256 (EG)

7. Recommendation 256 of part four of the Legislative Guide remains relevant in the group context and a number of steps outlined in that recommendation have not been repeated here as they require no modification for the group context. Other steps have been repeated and expanded and several new steps have been added to take account not only of actions required to be taken by directors with respect to the enterprise group member to which they have been appointed, but also actions that necessarily involve the parent and other group members, reflecting the position of the group member within the enterprise group and its relationship to other group members.

8. Where formal insolvency proceedings need to be commenced, it may be appropriate to introduce some of the mechanisms recommended in part three of the Legislative Guide with respect to domestic enterprise groups to facilitate the conduct of proceedings affecting two or more enterprise group members, in this case joint application for commencement and procedural coordination.

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[2] Legislative Guide, part three, recommendations 199-201.

[3] Legislative Guide, part three, recommendations 202-210.

II. Conflicting obligations

A. Draft recommendation

1. Purpose of legislative provisions

[The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different group members, which may have an impact upon the taking of steps required to discharge those obligations.]

2. Content of legislative provisions

256 (EG) bis. [The law relating to insolvency should address the situation where, in the period approaching insolvency, a director of one enterprise group member who holds that position, [or a management or executive position] in another or in other enterprise group members [, whether the parent or a controlled group member] has a conflict between the obligations owed to [the creditors of] those different group members.]

256 (EG) ter. [The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts, including obtaining advice to establish the exact nature of the different obligations, disclosing to creditors and other stakeholders situations likely to lead to conflicting obligations, appointing an additional director when the conflicting obligations cannot be reconciled and resigning where there is no alternative course of action available and resignation will not exacerbate the situation.]

B. Notes

9. This draft recommendation addresses the situation, common in enterprise groups, where a director holds that position in two or more group members, often including the parent. A director of one group member may also hold a management or executive position in another group member. Such a director may find that there is a conflict between the interests of the different group members and the obligations owed to the different group members. Such a conflict is likely to affect the director's ability to independently assess what action is required to address the financial difficulty of each of those group members and to take the reasonable steps outlined in recommendation 256 (EG). To avoid a situation where one group member is disadvantaged in favour of another group member, the insolvency law might specify that certain measures be taken to identify and manage such a conflict of interest. Those measures might require that for each group member adequate consideration is to be given to the steps outlined in recommendation 256 (EG), that the conflict should be managed in a way that does not disadvantage the creditors of the affected group members, that resignation[4] is only to be used as a solution where it will not exacerbate the situation and that a director with obligations to several group members cannot use the obligations to one group member as a defence to the treatment afforded to another group member.

[4] See Legislative Guide, part four, chapter II, paragraph 27, which discusses resignation in the context of defences available to directors.

III. Identifying the parties who owe the obligations: recommendation 258

A. Recommendation

1. Purpose of legislative provisions

The purpose of the provisions is to identify the persons owing the obligations in recommendation 255.

2. Contents of legislative provisions

Persons owing the obligations

258. The law relating to insolvency should specify the person owing the obligations in recommendation 255, which may include any person formally appointed as a director and any other person exercising factual control and performing the functions of a director.

B. Notes

10. Part four of the UNCITRAL Legislative Guide is limited to formally appointed directors or any person exercising factual control and performing the functions of a director. Paragraph 15 of chapter II of the commentary to part four gives a broader indication of who might be included within the scope of part four, such as those charged with making, those who actually make and those who ought to make key decisions with respect to the management of the company and provides a list of key functions as examples.

11. The Working Group might wish to consider whether the formulation of recommendation 258 is broad enough in the enterprise group context to capture all of those who ought to owe the obligations in recommendation 255 (EG) or whether any further guidance ought to be provided for consideration. Commentators cite examples of jurisdictions in which adherence to the single entity notion and a narrow interpretation of relevant laws that typically ignores the reality of enterprise groups, results in a very high standard of proof. Accordingly, it can be particularly difficult, and even a highly speculative venture, to try to establish breach of obligations such as those provided by recommendation 255 (EG) by, for example, shadow directors such as, depending on the circumstances, the enterprise group parent.[5] Courts are typically cautious about interfering with the concepts of corporate personality and limited liability. One approach may be to retain the current drafting of recommendation 258 and discuss the possible application of the provision in the enterprise group context and, in particular, where other group members function as shadow directors, in the commentary.

[5] Irit Mevorach, The Role of Enterprise Principles in Shaping Management Duties at Times of Crisis, European Business Organization Law Review 14:471-496, p. 486.

D. Note by the Secretariat on recognition and enforcement of foreign insolvency-derived judgements

(A/CN.9/WG.V/WP.126)

[Original: English]

Contents

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements.

2. The suggestion to take up work on this topic has its origin in recent judicial decisions,[1] which have led to some uncertainty concerning the ability of some courts, in the context of recognition proceedings under the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), to recognize and enforce judgements given in the course of foreign insolvency proceedings, such as judgements in transaction avoidance proceedings, on the basis that neither article 7 nor 21 of the Model Law explicitly provides the necessary authority. Moreover, in those States that have enacted article 8 of the Model Law, decisions by foreign courts on the lack of such explicit authority in the Model Law for recognition and enforcement of insolvency-derived judgements might be regarded as persuasive authority. The absence of any applicable international convention or other regime to address the recognition and enforcement of insolvency-derived judgements, together with a concern that the uncertainty created by the judgements might have a chilling effect on further adoption of the Model Law, led to the proposal to develop a model law or model legislative provisions.

3. While it may not explicitly provide for recognition and enforcement of insolvency-derived judgements, the scope and content of the UNCITRAL Model Law may provide a useful reference for the scope and content of work to achieve this new mandate as it does provide a framework for the cross-border recognition of certain

[1] *Rubin v Eurofinance SA*, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case No. 1270.

decisions of a foreign court, namely to commence insolvency proceedings and to appoint an insolvency representative.

I. Background — recognition and enforcement of judgements regimes

4. The law of recognition and enforcement of judgements is arguably becoming more and more important in a world in which persons and assets can easily be moved across borders. There is a general tendency towards more liberal recognition of foreign judgements, with more treaties requiring it in specific subject areas (e.g. conventions relating to family matters, transportation and nuclear accidents) and more narrow interpretation of the exceptions in treaties and domestic laws. Efforts to develop an international regime for recognition and enforcement of judgements more generally have not necessarily met with success.

5. Under applicable national regimes, some States will only enforce foreign judgements pursuant to a treaty regime (e.g. Netherlands and some Scandinavian countries); others enforce foreign judgements more or less to the same extent as local judgements (United States of America). Between those two positions there are many different national approaches.

6. Regionally, Latin America,[2] the European Union[3] and the Middle East[4] have adopted various conventions and regulations. Drafting of conventions has been suggested in a number of regional organizations, but not taken up by, for example, the Asian-African Legal Consultative Committee, LAWASIA, Association of Southeast Asian Nations (ASEAN) and the Southern African Development Community (SADC).[5]

7. Internationally, the 1971 Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters developed by the Hague Conference on private international law (1971 Hague Convention) is in force only between Cyprus, the Netherlands, and Portugal — where it is largely displaced by the Brussels I Regulation — and Albania and Kuwait. In 1999, negotiations began at the Hague towards a global judgements convention, but a 2001 draft stalled (2001 draft Hague convention). Instead, those negotiations led to a narrower Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), which regulates jurisdiction in civil and commercial matters based on the exclusive choice of parties and mandates the conditions and procedures for the recognition of ensuing judgements (articles 8-15). Mexico has acceded to the convention; the United States of America and the European Community signed it in 2009.

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[2] Latin America Art. 2 of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards lays down conditions for enforcement; the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgements specifies requirements for the jurisdiction of the rendering court. Whereas the former Convention has been ratified by eight Latin American countries, the latter is in force only between Mexico and Uruguay.

[3] Brussels I Convention (Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters) and the Lugano Convention of 2007; with respect to insolvency, judgements opening insolvency proceedings are recognized under Art. 16 of the Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, with the enforcing State's public policy as the only relevant defence (Art. 26); other judgements of the insolvency court are enforceable under the Brussels I Regulation (Art. 25).

[4] The most relevant Middle Eastern treaties include the 1952 Agreement as to the Execution of Judgements ("Arab League Judgements Convention"), the 1983 Arab Convention on Judicial Co-operation ("Riyadh Convention"), and the 1995 Protocol on the Enforcement of Judgements Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ("GCC Protocol").

[5] Ralf Michaels, Recognition and Enforcement of Foreign Judgements, Max Planck Encyclopedia of International Law, 2009, para. 19.

8. Insolvency decisions are typically excluded from a number of these instruments. Article 1, subparagraph 5, of the 1971 Hague Convention, for example, provides that the convention does not apply to "questions of bankruptcy, composition or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2(e), of the 2005 Hague Convention provides that it does not apply to "insolvency, composition and analogous matters".

II. Approaches to recognition and enforcement

9. Under some national laws, recognition and enforcement are two separate processes and may be covered by different laws. In some federal jurisdictions, for example, recognition may be subject to national law, while enforcement is subject to State law. Recognition may have the effect of making the foreign judgement a local judgement that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgement, it goes beyond recognition. Confusion may be caused in some States as to whether both can be achieved through a single application or whether two separate applications are required.

10. In the case of some judgements, recognition might be sufficient and enforcement will not be needed, for example, declarations of rights or non-monetary judgements, such as the discharge of a debtor or a judgement that the defendant did not owe any money to the plaintiff. The receiving court may simply recognize that finding and if the plaintiff were to sue the defendant again on the same claim before that court, the recognition already accorded would be enough to dispose of the case. Thus while enforcement must be preceded by recognition, recognition need not be accompanied or followed by enforcement.

11. Section 481 of the 1986 American Law Institute (ALI) Restatement (Third) of Foreign Relations Law stipulates that a final judgement of a court of a foreign State is entitled to recognition in courts in the United States of America and such a judgement may be enforced in accordance with the procedure for enforcement of judgements applicable where enforcement is sought. The 2005 Hague Convention, article 8, provides that a judgement is to be recognized only if it has effect in the State of origin (i.e. it is legally valid and operative), and enforced only if it is enforceable in the State of origin, raising the distinction between recognition and enforcement. The official commentary to article 8[6] indicates that recognition means the receiving court gives effect to the determination of the legal rights and obligations made by the originating court and that enforcement means the application of the legal procedures of the receiving court to ensure that the defendant obeys the judgement given by the originating court. Where a judgement ceases to have effect in the originating State, it should not be recognized in another State. The power to review a decision to recognize under article 18 of the UNCITRAL Model Law where the status of the foreign proceedings has changed might also be relevant in the judgements context.

12. The Working Group might wish to consider what recognition and enforcement of an insolvency-derived judgement might mean, for example as described above with respect to the 2005 Hague Convention or that it would have the same force and effect as a judgement entered by a court of the recognizing jurisdiction. The Working Group may also wish to consider whether recognition and enforcement should be addressed in a draft instrument as a single concept.

[6] Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report by Trevor Hartley and Masato Dogauchi, para. 170, available from www.hcch.net/upload/expl37final.pdf.

III. Judgements to be covered by a recognition and enforcement regime

A. General characteristics for recognition

13. Some regimes specify the characteristics that a judgement must possess in order for it to be recognized under that regime. Many of those regimes typically require a judgement to be final, conclusive and enforceable in the originating State before it can be recognized. Finality usually means that judgements are not recognizable until no ordinary appeals can be launched against them. Exceptions exist in some legal systems, especially where close legal relations between States enable a regime to account for the consequences of enforcing a judgement that is later reversed (e.g. art. 46, Brussels I Regulation for judgements, art. 31 for preliminary injunctions), where plaintiffs have a specific interest in speedy enforcement (e.g. art. 4(2) Hague Maintenance Convention) or where the jurisdiction allows enforcement to prevent inappropriate depletion of assets or transfer of assets out of the jurisdiction. Finally, judgements must usually be decided on the merits. This requirement excludes, in particular, mere procedural decisions, which are usually not recognized because each State's courts usually follow their own rules of procedure and will therefore not be bound by another court's decision based on its own procedural rules.

14. Article 4 of the 2005 Hague Convention provides that a judgement covered by the Convention means "any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including by an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. An interim measure of protection is not a judgment."

15. Other regimes envisage recognition of provisional judgements. The definition of a judgement covered by article 23 of the 2001 draft Hague convention uses wording similar to the wording subsequently adopted in the first sentence of the 2005 Hague Convention definition, but had also included the words "decisions ordering provisional or protective measures in accordance with article 13 paragraph 1" (which dealt with jurisdiction to order such measures). Principles developed by the European Max Planck Group for Conflict of Laws in Intellectual Property (CLIP Principles) cover, among other things, appealable judgements, provisionally enforceable orders or judgements rendered in default of appearance. The Principles also include orders for the payment of money, orders for the transfer and delivery of property, orders regulating the conduct of the parties, and orders declaring the rights and liabilities of the parties, including negative declarations such as declarations on non-infringement of intellectual property rights, and monetary and non-monetary judgements. The CLIP Principles grant discretion to a court to stay recognition and enforcement of foreign non-final judgements when they are subject to review in the rendering State, using the word "may" in the relevant provisions. The 2001 draft Hague convention uses the same discretionary terminology in article 25, subparagraph (4).

B. "Insolvency-[derived] [related]" judgements

16. Very few States have recognition and enforcement regimes that specifically address insolvency-derived judgements. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to derive from insolvency proceedings. In the United States of America, for example, a judgement or decree against a creditor or third party determining rights to property claimed by the insolvency estate, awarding damages against a third party, or avoiding a transfer of property can be considered insolvency-derived judgements. These are considered to be adversarial matters, requiring service of documents originating the action and resulting in a judgement. An order or decree confirming a plan of reorganization, granting a bankruptcy discharge or allowing or rejecting a claim against the insolvency estate are not considered insolvency-derived judgements, even if those orders may have some of the attributes of a judgement. However, Chapter 15 of the

Bankruptcy Code (enacting the UNCITRAL Model Law in the United States of America) provides a procedure for the recognition and enforcement of orders and decrees entered in foreign proceedings that would include an order confirming a foreign plan of reorganization; applications under Chapter 15 routinely seek such relief.

17. Several approaches to defining what constitutes an "insolvency-derived judgement" might be envisaged. One approach might be to list certain categories of judgements that would be covered, some of which might be monetary judgements and others not. Monetary judgements might include fraudulent conveyance actions; preference actions; actions to obtain turnover of property of the insolvency estate; enforcement actions for sums due to the insolvency estate. Non-monetary judgements might relate to equitable relief including the establishment of a constructive trust; requirements for accountings; recognizing the discharge of a debtor; actions to modify or enforce the stay of actions in an insolvency case; and actions to determine whether a particular debt is dischargeable.

18. If that approach were to be adopted, careful consideration would need to be given to what should be included in the list, whether each category of judgement included should be explained and whether the list could include a "catch-all" provision extending coverage to "other" judgements related to insolvency proceedings. Such a provision could have the benefit of avoiding inadvertent omission from the list of some relevant types of judgements. However, there is also the potential for such a provision to be applied more broadly than intended, and in such a way that might create conflicts (or at least overlap) with work on recognition of judgements more generally.[7]

19. A different approach might be to adopt a definition identifying general characteristics to be possessed by an insolvency-related judgement. The general characteristics identified above would provide a starting point, but something more might be required to delimit the connection between the judgement in question and the insolvency proceedings.

20. The European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), for example, provides automatic recognition for judgements commencing insolvency proceedings; recognition and enforcement for other judgements depends on the type of judgement (article 25). Judgements on the course and closure of insolvency proceedings (article 25, subparagraph 1.1), judgements deriving directly from the insolvency proceedings and that are closely linked to the insolvency proceedings even if handed down by another court (article 25, subparagraph 1.3) and judgements relating to preservation measures taken after a request for commencement of insolvency proceedings (article 25, subparagraph 1.3) will be recognized automatically in the same manner as commencement decisions, except where they might result in the limitation of personal freedom or postal secrecy; other judgements are subject to recognition and enforcement under Brussels I,[8] if applicable.

21. Judgements under the EC Regulation concerning the following matters have been held to fall into the category of deriving directly from the insolvency proceedings and closely linked with them: avoidance actions,[9] insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; actions on the insolvency representative's liability for damages, if exclusively based on the carrying out of the insolvency proceedings; action by a creditor aiming at the nullification of an insolvency representative's

[7] Ongoing work of the Hague Conference on private international law might be one example.
[8] Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (1968).
[9] European Court of Justice (ECJ), *Seagon v Deko Marty* C-339/07.

decision to recognize another creditor's claim; and claims by an insolvency representative based on specific insolvency law privilege.[10]

22. Judgements under the EC Regulation that have been held not to fall into that category have included: actions by and against an insolvency representative which would have been possible also without the insolvency proceedings; criminal proceedings in connection with insolvency; an action to recover property in the possession of the debtor; an action to determine the legal validity or amount of a claim pursuant to general laws; claims by creditors with a right for segregation of assets;[11] claims by creditors with a right for separate satisfaction (secured creditors); and an avoidance action filed not by an insolvency representative but by a legal successor or assignee.[12]

23. Drawing upon the information above, the characteristics relevant to defining the appropriate connection between the judgement and insolvency proceedings might include: that the judgement is related to the core of the insolvency proceeding concerning the debtor,[13] that the judgement affects the debtor or its insolvency estate,[14] and that the aim of the action leading to the judgement could not be achieved without the commencement of insolvency proceedings.

IV. Jurisdiction of the originating court

24. Existing conventions and uniform laws on enforcement and recognition of judgements uniformly require the recognizing court to assess the jurisdiction of the originating court in some way. Some, the so-called "double conventions," combine international agreement on permissible bases of jurisdiction for a specified list of judgements with agreement on the procedure for cross-border recognition and enforcement of such judgements once entered. Examples include the European Union Conventions of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the "Brussels Convention") and of 16 September 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the "Lugano Convention"). Other conventions engage solely on the issue of recognition and enforcement — the so-called "single conventions" on the topic, which only deal with the jurisdiction of contracting States indirectly, that is to say, as a condition for the recognition of judgements.[15] Both sorts of conventions have benefits and detriments, but even with a single convention an "assessment of the jurisdiction of the originating state forms a basis for distinguishing between judgements that should be recognized and enforced and those that should not."[16]

25. The EC Regulation is a double convention on the recognition of insolvency proceedings in that it governs not only the recognition of such proceedings, but also

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[10] ECJ, SCT *Industri v Alpenblume* C-111/08.

[11] ECJ *German Graphics v can der Schnee* C-292/08.

[12] ECJ *F-Tex* C-213/10.

[13] Where "insolvency proceedings" might be defined consistently with "foreign proceeding" in article 2 of the UNCITRAL Model Law or "insolvency proceedings" in subparagraph 12(u) of the UNCITRAL Legislative Guide. It should be noted that the definition of "foreign court", which forms parts of the definition of a "foreign proceeding" under the Model Law is limited to the court with authority to control or supervise "foreign proceedings" (article 2(e)), which in turn are defined as being, essentially, proceedings for the purpose of reorganization or liquidation of the debtor (article 2(a)). Such a definition of the relevant court might be too narrow, particularly, for example, in States that do not have dedicated insolvency courts; there may be a range of different courts or levels of court in some States with jurisdiction to enter a judgement in a matter related to the insolvency proceedings commenced in another court, but which lack the authority to control or supervise those insolvency proceedings that would qualify them as a "foreign court" under the Model Law.

[14] Where "insolvency estate" is defined in the Legislative Guide, introduction, subparagraph 12(t): "assets of the debtor that are subject to the insolvency proceedings".

[15] Peter Nygh and Fausto Pocar, Report of the Special Commission, appended to the Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters (2000), p. 27.

[16] Ibid.

agreed bases for jurisdiction. The UNCITRAL Model Law governs only recognition and not jurisdiction, but limits recognition to those foreign proceedings where jurisdiction is based either on the fact that those proceedings are pending at the location of the debtor's centre of main interests (COMI) for main proceedings or establishment for non-main proceedings.

26. The English *Dicey* Rules,[17] which restate the position at common law, allow for enforcement of foreign judgements where the defendant (i) was present in the foreign country when proceedings were instituted; (ii) was the claimant, or counterclaimed, in the proceedings in the foreign court; (iii) had submitted to the jurisdiction of the foreign court by voluntarily appearing; or (iv) had agreed, before the commencement of the proceedings to submit to the jurisdiction.

27. Canada adopts a test of "real and substantial connection" between the cause of action and the foreign court. Traditional indicia of jurisdiction, such as agreement to submit, residence and presence in the foreign jurisdiction, serve to bolster the real and substantial connection. Various cases have identified a non-exhaustive set of "presumptive factors" (as well as factors the court should use in recognizing new presumptive factors) that, if present in the case at issue, give rise to a rebuttable presumption of jurisdiction. These factors have been used in cases involving tort claims, but may not have been applied in cases involving *in personam* judgements to pay money, such as in the *Rubin*[18] case in the United Kingdom of Great Britain and Northern Ireland. In tort, the presumptive factors are: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province.[19]

28. A question to be considered by the Working Group is how the issue of jurisdiction might be approached. One approach might be to focus, as a starting point, on judgements issued by courts of the jurisdiction in which the debtor has its COMI or an establishment. Those two concepts are already used in the cross-border context and the Guide to Enactment and Interpretation of the UNCITRAL Model Law would provide a source of relevant explanatory material. Such an approach could lead, however, to the exclusion of judgements from courts[20] with no jurisdictional claim over main or non-main insolvency proceedings concerning the debtor (within the meaning of the Model Law), including judgements entered by a court with jurisdiction over insolvency proceedings concerning the debtor, but commenced on the basis of presence of assets or the place of the debtor's registration. Since judgements from those courts might also be relevant to the goal of any instrument to be developed, a wider formulation might be required using some of the more general criteria above such as jurisdiction over the debtor.

V. Procedures for obtaining recognition and enforcement

29. Procedures for recognition are addressed in various conventions and instruments in addition to articles 15 and 16 of the UNCITRAL Model Law, covering who may apply and the procedure to be followed, particularly with respect to the documents and information to be supplied to the receiving court. As a starting point, the Working Group may wish to consider the procedure established under the Model Law.

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[17] Dicey, Morris & Collins, *Conflict of Laws* (15th edition, 2012), Rule 43. This rule was the subject of the decision in *Rubin*, see footnote 1.

[18] See footnote 1.

[19] *Van Breda v Village Resorts* Ltd 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 90.

[20] The UNCITRAL Legislative Guide, glossary, paragraph 8, explains that while the word "court" includes a judicial or other authority competent to control or supervise insolvency proceedings, an authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as a court for the purposes of the Guide. See also footnote 13 above with respect to the definition of "foreign court" in the UNCITRAL Model Law.

A. Persons who may apply

30. The UNCITRAL Model Law regime (article 15) is limited to foreign representatives as defined, in keeping with the limited subject-specific nature of the regime. The Hague conventions, which focus on recognition and enforcement more broadly, refer only to the party seeking recognition or applying for enforcement of a judgement.

B. Documents to be produced

31. Article 15 of the UNCITRAL Model Law requires a certified copy of the foreign decision or a certificate from the foreign court affirming the substance of the decision or some other evidence acceptable to the recognizing court as to the substance of the foreign decision. Article 13 of the 2005 Hague Convention requires the party seeking recognition or applying for enforcement to produce a complete and certified copy of the judgement; if the judgement was given by default, the original or a certified copy of a document establishing that the document instituting the proceedings or an equivalent document was notified to the defaulting party; and any documents necessary to establish that the judgement has effect or, where applicable, is enforceable in the originating State. Additional information that might be useful could relate, in case the judgement is subject to an appeal, to identification of the appellate court where that appeal is pending, and the status of the appeal, unless recognition of such judgements were to be excluded.

32. With respect to translation of documents, article 15, paragraph 4, of the UNCITRAL Model Law makes the requirement for translation discretionary. The 2005 Hague Convention, in comparison, provides that if documents are not in an official language of the receiving State, they are to be accompanied by a certified translation into an official language, unless the law of the recognizing State provides otherwise (art. 13(4)). The 2001 draft Hague convention also specifies that no legalization or similar formality may be required (art. 29); article 16, paragraph 2, of the UNCITRAL Model Law provides a presumption of authenticity of documents, "whether or not they have been legalized".

33. A court considering an application for recognition of an insolvency-derived judgement might be assisted by additional pieces of information that the foreign representative will be in the best position to provide. Those might include, for example, in addition to the type of evidence to be provided under article 15, paragraph 1, of the Model Law, information as to whether the party against whom enforcement of the judgement is sought was notified of the proceeding in which the judgement was obtained and had an opportunity to be heard in that proceeding and as to known insolvency proceedings pending against the debtor (Model Law article 15, paragraph 3).

34. Where the originating court considered issues in its decision such as the basis for exercising jurisdiction over the party against whom relief is sought and the adequacy of service of documents on that party, that information could be extremely helpful to the receiving court, particularly if recognition and enforcement were likely to be challenged. The usefulness of a court including relevant information in its orders is recognized in the Guide to Enactment and Interpretation of the UNCITRAL Model Law in the context of articles 2 and 17 (paras. 139 and 152-153). Courts might thus be encouraged to include such information when issuing an insolvency-related judgement.

35. The recognition process might be assisted by establishing presumptions relating to the judgement in much the same way as article 16, paragraphs 1 and 2, of the Model Law establish presumptions concerning qualification of the foreign proceeding and the foreign representative (for the purposes of article 2 of the Model Law), and the authenticity of documents.

C. Decision to recognize

36. The decision to recognize is an essential part of a recognition and enforcement regime, requiring a court to recognize, and permitting a court to enforce, an insolvency-related judgement — without reopening the merits of the decision — as long as several conditions are met. This approach is similar to that taken by the UNCITRAL Model Law, which requires recognition of foreign proceedings if the specific conditions are met and does not permit the recognizing court to investigate whether the foreign proceedings were properly commenced. The 2005 Hague Convention, article 8, provides that in recognizing a foreign judgement there shall be no review of the merits of the judgement given by the originating court. The receiving court is bound by the findings of fact on which the originating court based its jurisdiction, unless the judgement was given by default. The consequence of such an approach is that foreign judgements would be recognized even when a domestic court might have reached a different decision on the issue.

37. As to the requirements for recognition, these generally relate to the application being made by the proper person, possibly a reference to the court issuing the judgement (especially if there were to be reliance on a COMI or establishment requirement), information required to be provided in support of the application (as discussed above), and ensuring that the request falls within the scope of the instrument and has been submitted to the correct court. Where the originating court is required, in order to ensure recognition and enforcement, to set forth in its judgement its conclusions of law and findings of fact that served as the basis of its judgement, the receiving court would only grant the application if that requirement was met. Without such information, a receiving court may not feel equipped to evaluate the propriety of the judgement (even without seeking to evaluate whether the decision was correct on the merits).

38. Article 15 of the 2005 Hague Convention addresses severability of a judgement, allowing for recognition or enforcement of only the part that is severable. The ability to exclude certain elements of a judgement, such as a punitive damages award, might be relevant. Such an exclusion might also be covered by the grounds discussed below for refusing recognition, specifically the public policy exception along the lines of article 6 of the UNCITRAL Model Law.

39. Further requirements might reflect article 17, paragraph 3, of the UNCITRAL Model Law and article 14 of the 2005 Hague Convention, which require the receiving court to act expeditiously, as well as article 17, paragraph 4, of the Model Law, which allows modification or termination of recognition if it is shown that the grounds for granting recognition were fully or partially lacking or have ceased to exist. Article 18 of the Model Law, dealing with subsequent information, might also be relevant to a recognition regime to address, for example, changes in the status of the recognized decision or knowledge concerning judgements in other jurisdictions concerning matters covered by the recognized decision (such as might be grounds for non-recognition under paragraph 40 below).

VI. Grounds to refuse recognition

40. Relevant conventions and other laws provide a number of different grounds for refusing an application for recognition. These are typically broader than, although they include, the public policy exception to recognition in article 6 of the UNCITRAL Model Law. Grounds that might be relevant to refusing recognition of an insolvency-derived judgement might include:

(a) The judgement is subject to review or appeal in the originating State or the time limit for seeking review or appeal has not expired. This might be required information for the purposes of an application for recognition and the party against whom relief is sought might also have the opportunity to demonstrate the existence of further proceedings;

(b) Recognition or enforcement would be manifestly incompatible with the public policy of the receiving State (Model Law, article 6). This could potentially be used to deny recognition to judgements obtained by fraud or without due process, including for example, where there was a failure to provide notice to known affected parties;

(c) The judgement is inconsistent with a prior judgement given in the receiving State in a proceeding involving the same defendant and the same debtor (2001 draft Hague convention, article 28.1(b); 2005 Hague Convention, article 9(f)); or

(d) The judgement is inconsistent with an earlier judgement given in another State involving the same defendant and the same debtor, provided that the earlier judgement fulfils the conditions necessary for its recognition in the receiving State (2001 draft Hague convention, article 28.12(b); 2005 Hague Convention article 9(g)).

41. A form of reciprocity might also be a ground for refusing recognition in some States, where, for example, a comparable judgement from the receiving State would not be recognized or enforced by the originating court. Such an approach might alleviate any concerns that an enacting State might have regarding the possibility that it would be unilaterally offering to recognize and enforce another State's judgements when that other State may itself be unwilling to recognize and enforce foreign judgements. Such an exception could be discretionary rather than mandatory and a receiving court could still choose to recognize and enforce the judgement if appropriate. It should be recalled, however, that suggestions to include such a reciprocity provision in the UNCITRAL Model Law were rejected and the text, accordingly, does not include such an exception to recognition. It applies on a unilateral basis without any guarantee that the originating State would recognize insolvency proceedings emanating from the receiving State.

42. Grounds for refusal might also relate to the nature of the judgement, including judgements raising money for public purposes such as those concerning taxes, fines and monetary penal judgements, as well as judgements relating to domestic relationships, which might be relevant in insolvency matters involving individuals.

43. Grounds for refusal are sometimes divided into mandatory and discretionary grounds. Depending on the manner in which a provision on grounds for declining recognition were to be drafted, the receiving court might be able, but not required, to decline to recognize and enforce an insolvency-related judgement on some or all of the grounds indicated above. The party against whom relief was sought would have the burden of demonstrating that one of those exceptions applied.

VII. Other potentially relevant articles of the Model Law

44. Other articles of the Model Law not specifically mentioned above might serve as models for provisions to be included in a model law or model provisions addressing recognition and enforcement of insolvency-derived judgements. These might include:

(a) Preamble;

(b) Scope: article 1;

(c) International obligations: article 3;

(d) Identifying the competent court: article 4;

(e) Additional assistance under other laws: article 7;

(f) Interpretation: article 8;

(g) Provisional relief: article 19;

(h) Access/standing/participation of a foreign representative in recognition proceedings: articles 12 and 24; and

(i) Presumption of insolvency: article 31.

E. Report of the Working Group on Insolvency Law on the work of its forty-seventh session (New York, 26-29 May 2015)

(A/CN.9/835)

[Original: English]

Contents

I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session (April 2014) (A/CN.9/803).

B. Directors' obligations in the period approaching insolvency: enterprise groups

2. At its forty-fourth session, the Working Group had also agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group, whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and to identify any additional issues (such as conflicts between a director's duty to its own company and the interests of

the group, as well as issues of governing law) that might need to be addressed. The informal expert group reported back in the second half of 2014 with a draft text for consideration by the Working Group at its forty-sixth session (A/CN9/WG.V/WP.125).

C. Recognition and enforcement of insolvency-derived judgements

3. At its forty-fourth session, the Working Group had further agreed (A/CN.9/798, para. 30) that it should seek at an appropriate time a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements, which had been discussed at the colloquium held in conjunction with the forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to the two topics concerning treatment of enterprise groups in insolvency, Working Group V's other priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the Model Law. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155). The Working Group commenced its deliberations on the topic at its forty-sixth session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-seventh session in New York from 26-29 May 2015. The session was attended by representatives of the following States Members of the Working Group: Argentina, Armenia, Austria, Brazil, Bulgaria, Canada, China, Denmark, France, Germany, Greece, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, Namibia, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, 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: Belgium, Chile, Dominican Republic, and Libya.

6. The session was attended by the following non-member States and entities: Holy See.

7. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: World Bank, and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Hague Conference on Private International Law (HCCH);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN), Comité Maritime International (CMI), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), Inter-Pacific Bar Association (IPBA), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar (NYCBAR), and Union Internationale des Avocates (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Emil Szczepanik (Poland)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.127);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.128);

(c) A note by the Secretariat on the obligations of directors of enterprise group members in the period approaching insolvency (A/CN.9/WG.V/WP.129);

(d) A note by the Secretariat on the recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.130); and

(e) Observations by France on document A/CN.9/WG.V/WP.128 (A/CN.9/WG.V/WP.131).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) the obligations of directors of enterprise group members in the period approaching insolvency; (b) facilitating the cross-border insolvency of multinational enterprise groups; and (c) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations with the obligations of directors of enterprise group members in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.129; followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.128; and the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.130. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Directors obligations in the period approaching insolvency: enterprise groups

13. The Working Group commenced its discussion of this topic on the basis of the draft recommendations and commentary contained in document A/CN.9/WG.V/WP.129. At the outset of the discussion, the Working Group confirmed that it would not be referring the text for adoption by the Commission in 2015, but that it would await further development of the work on enterprise groups to ensure that consistency between the texts was achieved. The Secretariat was requested to prepare a revised text based on the conclusions noted below for the forty-eighth session of the Working Group.

Recommendations 267-268

Purpose clause

14. The Working Group adopted the purpose clause, with the following revision of paragraph (d): changing the word "ensuring" to "taking reasonable steps to ensure".

Draft recommendation 267

15. The Working Group indicated its preference for Variant 2 of draft recommendation 267, and adopted it with the following revisions:

(a) Deletion of the words "the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members";

(b) Ensuring that the references to maximization of the value of the enterprise group as a whole or some of its parts were consistent throughout the purpose clause and draft recommendation 267, subparagraph (b);

(c) In the second sentence of subparagraph (b), changing the last phrase to read "are no worse off than if that group member had not been managed so as to promote such a solution"; and

(d) Changing the word "ensuring" in draft recommendation 267, subparagraph (b) to "taking reasonable steps to ensure".

Draft recommendation 268

16. The Working Group adopted draft recommendation 268 with the following revisions: deleting the text and square brackets around "[possible]" and deleting the brackets and retaining the text "not inconsistent with the obligations of the director to the group member of which they are director".

Commentary

17. A suggestion was made that the notion of balancing the interests of group members against each other in paragraph 7 of the commentary should be more nuanced, possibly through clarifying that it would only apply to mediating opposed rights where the director had conflicting obligations. In addition, it was proposed that the safeguard that creditors and other stakeholders should be no worse off than if the enterprise group solution had not been pursued should be reflected.

18. In respect of paragraph 23 of the commentary, it was suggested that the word "may" should be deleted in the last sentence. Further, in the third sentence of paragraph 25, it was suggested to add the phrase "relevant information regarding" after the word "disclose", and to substitute the word "reasonable" for the word "desirable". It was also suggested that the phrase "a good board process" in paragraph 27 was unclear and that reference should be made instead to good corporate governance.

Recommendations 269-270

Purpose clause

19. The Working Group adopted the purpose clause for draft recommendations 269 and 270 as drafted.

Draft recommendation 269

20. The Working Group agreed that the heading for the contents of the legislative provisions should be "Conflict of obligations" and that "[Conflicting obligations]" should be deleted. It was noted that there should be conformity between the heading of the commentary and the heading of the draft recommendation.

Draft recommendation 270

21. The Working Group indicated a preference for Variant 3 and approved the drafting with the following revisions:

(a) In subparagraph (a), deleting the word “exact” and adding the words “and extent” after the word “nature”;

(b) In subparagraph (b), adding the words “including, in particular, the nature and extent of the conflict” after the phrase “relevant information”;

(c) In subparagraph (d), retaining the text in the first set of square brackets, “Seeking the appointment of”, and deleting the brackets surrounding it as well as the second bracketed text “[Appointing]”; and

(d) In subparagraph (e), deleting the phrase “and resignation will not exacerbate the situation”.

22. A proposal to add to an appropriate location in draft recommendation 270 the words “submitting the decision for approval by a body or bodies that are not exposed to the conflict of interest” was not supported.

V. Facilitating the cross-border insolvency of multinational enterprise groups

23. The Working Group commenced its discussion of the topic on the basis of the text in document A/CN.9/WG.V/WP.128. A number of different views were expressed as to how discussion on the different parts of the text might be approached. It was acknowledged that if some of the domestic issues outlined in part I were not addressed, it might be difficult to address the cross-border issues in part II. It was observed that the purpose of the work was to limit the number of parallel proceedings commenced with respect to enterprise group members, and where that was not feasible, to increase coordination and cooperation. It was proposed that the possibility of improving domestic insolvency regimes in order to achieve those two goals should be examined, commencing with discussion of part II of the text; that discussion should assist in identifying which of the provisions in part I were needed. The Working Group agreed with that approach.

24. It was suggested that the new instrument should take the form of an addendum to the Model Law on Cross-Border Insolvency (the Model Law). It should focus initially on the powers of the receiving court. Further, the text should contain a few key articles and should avoid changes to the existing provisions of the Model Law that were not strictly related to cross-border insolvency of enterprise groups. It was observed that the goal was not to change the existing Model Law or Legislative Guide, but rather to identify gaps and additional provisions needed to facilitate the effective treatment of cross-border insolvency of multinational enterprise groups.

25. The Working Group agreed to first consider draft articles 3 to 5 dealing with recognition, and draft articles 6 to 8 concerning relief and protection of creditors. Reference was made to paragraph 9 of the working paper and the need to consider the relevance of provisions such as articles 3 to 14 of the Model Law, in particular the disconnection clause in article 3.

Recognition

26. The discussion of draft articles 3 to 5 gave rise to a number of concerns and reservations of a general nature. The first concerned the basis on which proceedings commenced in the originating jurisdiction, whether based on COMI, establishment, or some other criteria. If the recognition regime proposed were restricted to recognizing proceedings from the jurisdiction of the COMI or establishment of a debtor, that situation was already covered by the Model Law and there was no need to add the requirements set out in draft article 3, paragraph 3. However, if the Working

Group were seeking to go further as proposed in draft article 3 and to recognize a proceeding commenced on a basis, for example, that it was necessary and integral to an enterprise group solution, a number of issues would need to be considered and the criteria for recognition augmented. It was observed that: a recognition standard based upon what was necessary and integral might be imprecise and lack certainty for creditors; the possibility of having a group solution was a forward-looking standard that did not emerge until after insolvency, while COMI was ascertained on the basis of existing information; and whilst there was only one COMI for each group member, there were multiple possibilities for locating a group solution.

27. There was also a possibility that there could be competing group solutions and it might be appropriate to consider for recognition purposes why the group solution was being sought and which group members were relevant to achieving that solution. The requirement that a group solution "is being developed" or "has been developed" created uncertainty on the basis, for example, that it was unclear what stage of development was required for the purposes of recognition, whether the solution should cover all relevant group members or whether creditors had approved the solution. There was also concern as to how a group insolvency solution might be developed, and in particular, how group members might participate in that development. It was observed that while a solvent entity might participate as envisaged in recommendation 238 of part three of the Legislative Guide, it was not clear how insolvent group members might participate. It was suggested that such participation might occur by providing standing for group members to appear and be heard in the coordinating court without subjecting themselves to the jurisdiction of that court. In such a scenario, it was not intended that participation would equate to commencement of insolvency proceedings.

28. Ensuring the protection of creditors was also a key concern; the solution might in part be provided by draft article 8 and the requirement for adequate protection, although it was also suggested that a standard of "no worse off" might be appropriate. A different view was that the "no worse off" standard was a liquidation test that applied on a territorial basis and should not be applied in a cross-border situation. A related concern was in respect of the consistency of the use of the "no worse off" standard in the work on directors' obligations and in respect of the cross-border insolvency of multinational groups. It was also observed that whilst it may be possible to assess whether an individual group member may be no worse off under a group solution, it would be difficult to assess whether that standard had been met for all members of an enterprise group.

29. As drafted, recognition was mandatory once the requirements of draft article 3 were met, but it was questioned whether there should be some overarching judicial discretion based upon, for example, protection of creditors and other stakeholders or failure to meet the goal of maximization of value or that present harm to local creditors was not outweighed by the potential gains of a group solution as implemented. It was observed that assessing maximization of value could be difficult depending on the type of proceeding (e.g. liquidation or reorganization) and the context in which it was being assessed, i.e. as part of a local proceeding or a global solution.

30. Another issue concerned the role of the court in the context of a group solution. A proposal was made that where proceedings were sought to be commenced in a jurisdiction other than the COMI of the debtor, the COMI court should have a role in approving the commencement of those proceedings. By way of clarification, it was suggested that the draft was not proposing commencement of proceedings in a jurisdiction with no connection to the debtor (see para. 44 of A/CN.9/829), nor was the draft text intending to require a State to cede jurisdiction over a debtor located in its jurisdiction.

31. The Working Group also expressed the following specific views on draft articles 3 to 5 of A/CN.9/WG.V/WP.128.

Article 3. Recognition of a foreign group proceeding

32. The following suggestions were made in respect of article 3. In subparagraph 3(a), a preference was expressed for the phrase "is being developed" rather than "has been developed"; and on subparagraph 3(c), views were expressed supporting both alternatives in square brackets. One view was that, in the absence of the foreign group proceeding emanating from the COMI jurisdiction, the proceedings should be a necessary and integral part of the group insolvency solution. The contrary view was that it was sufficient that the foreign group proceeding be participating in the enterprise group insolvency solution, as it might be difficult for the recognizing judge to determine at that stage whether the foreign proceeding was a necessary or integral part of the group insolvency solution.

33. It was proposed that an additional subparagraph be added to paragraph 3 to ensure that evidence should be adduced of all foreign group proceedings pending for enterprise group members, unless the Working Group was of the view that this requirement was already included in subparagraph 3(a). If that evidentiary requirement were added to subparagraph 3(a), it was noted that it should also be added to draft article 5, paragraph 4. A further suggestion was made that the substantive elements of paragraph 3 should be moved to draft article 5, paragraph 1.

34. It was suggested that showing a reasonable prospect of implementing a group insolvency solution might prove difficult and that the focus should be on a reasonable prospect of developing a group insolvency solution. It was noted that, in some circumstances, the absence of recognition might prove a barrier to the development or implementation of a group solution.

35. It was further proposed that an additional subparagraph (d) could be added to draft article 3, as follows: "Each group member sought to be represented by the foreign group proceeding has agreed to participate in that proceeding. Where such a group member is subject to insolvency proceedings in the court of its COMI, evidence shall be procured that that court has not prohibited participation of that group member in the foreign group proceeding." That proposal sought to confirm that all group members participating in the group solution had agreed to do so and had not been prohibited from doing so, thereby preserving a role for the COMI court and dealing with one of the concerns raised above.

36. Related proposals concerned revision to the definitions in draft article 2, subparagraphs (h) and (i) to address some of the concerns identified above. It was suggested that draft subparagraph (h) should define "foreign group proceeding" as "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 enterprise group insolvency solution is being developed and coordinated." In addition, it was suggested that the last sentence of subparagraph (i) defining "enterprise group insolvency solution" should be revised to read: "An enterprise group insolvency solution shall be coordinated through one or more proceeding, each in a State that is the centre of main interests of at least one enterprise group member." The rationale of those revisions was to focus on recognition of the coordinating proceeding; proceedings pending for individual group members could be recognized under the Model Law and no further provisions were required for that purpose. Another proposal was that subparagraphs (h) and (i) of draft article 2 should refer to a proceeding that was in a State that was the COMI of at least one group member and that was a necessary and integral part of the enterprise group insolvency solution. Those proposals received some support.

Article 4. Presumptions concerning recognition

37. If the text were to be developed as an addendum to the Model Law, it was suggested that draft article 4 was not required. It was proposed that the words "or principal place of business" in draft article 4, paragraph 3 be deleted as that notion was inconsistent with the place of central administration mentioned in the Guide to Enactment and Interpretation of the Model Law and there would be no need for preferential treatment of an unincorporated entity.

Article 5. Decisions to recognize a foreign group proceeding

38. It was suggested that subparagraph 1(a) was not required as its content was already reflected in the definition of a foreign group proceeding, and that subparagraph 1(b) was not required for similar reasons. It was suggested that changes in the status of the enterprise group insolvency solution should be added to the matters listed in paragraph 4. It was noted that draft article 5 did not specify, contrary to article 17 of the Model Law, whether the proceeding was recognized as a main or non-main foreign proceeding. Accordingly, it was suggested that this specification should be made.

39. It was proposed that a new subparagraph should be inserted between subparagraphs 1(a) and (b) of draft article 5 along the following lines, "The foreign group proceeding was commenced on the basis of the centre of main interests or the establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State." Some support was expressed in favour of that proposal. Reservations were expressed in respect of the mere presence of assets as an appropriate basis for commencement or recognition.

Summary of discussion on recognition

40. After a lengthy and complex discussion, the Working Group reached several working assumptions with regard to the thinking on the fundamentals of the proposals made and the objections raised. It was reaffirmed that a connection was required between the debtor and the jurisdiction in which insolvency proceedings with respect to that debtor were commenced. In addition, there was agreement that the basic goal of the work was to expand the provisions of the Model Law and the Legislative Guide to provide more solutions for cross-border insolvency of multinational enterprise groups, and that the first goal was to adopt a recognition regime, which would include recognition that a group solution was being sought or developed. It was acknowledged, however, that there were some reservations as to the detail of that regime. The questions of how and when the group solution would be developed were left for further discussion. It was acknowledged that a group solution might be developed in several ways, including informally through foreign representatives, with the participation of other relevant group members, through cooperation and coordination between courts, and through some means, as yet unspecified, of involving creditors.

Relief

41. It was noted that, unlike the Model Law, the draft regime in A/CN.9/WG.V/WP.128 did not provide for mandatory relief upon recognition.

42. In response to various concerns expressed, it was explained that, for the time being, the focus of the relief provisions was on a single group member and not on a number of group members; as to the governing law, the recognizing court would apply the governing law in the same way as under the Model Law. It was also explained that in the text set forth in A/CN.9/WG.V/WP.128, the reference to the group member to which the measures under draft articles 6 and 7 would be applicable was the group member subject to the insolvency proceeding the recognition of which was requested or obtained. The view was expressed that if a group solution could be developed, it would need to be implemented in a decentralized manner and that the treatment of assets and creditors would be in accordance with the law applicable to those assets and the creditors. It was also confirmed that significant weight would have to be given to creditors to determine what was in their best interests, as reflected in draft article 8. The relief sought in a particular jurisdiction would be subject to the law of that jurisdiction.

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding

43. It was suggested that draft article 6, subparagraph 1(c) should separate the concepts of administration and realization along the following lines: "Entrusting the administration of all or part of the enterprise group members' assets located in the State to the foreign group member representative or another person designated by the court or their realization in order to protect and preserve … jeopardy." A related proposal was that the two ideas could be reflected in separate subparagraphs.

Article 7. Relief that may be granted upon recognition of a foreign group proceeding

44. It was proposed that the changes referred to in paragraph 43 above should also be made in respect of subparagraph 1(e) of draft article 7. It was added that some distinction might need to be made between realization of some and of substantially all of the assets of the enterprise group member.

45. To address situations in which it might be problematic for the COMI court requested to commence proceedings to refuse to do so, it was proposed that the following changes should be made to subparagraph 1(a): deletion of "commencement or" and insertion after "continuation" of the following phrase ", or where permitted by relevant procedural laws, the commencement". It was suggested that in some jurisdictions both continuation and commencement might be problematic and that the proposed change should also be made in respect of both continuation and commencement. It was also noted that the same changes should apply to draft article 6, paragraphs 1 and 2 and to draft article 7, subparagraph 1(b).

46. The Working Group noted that it would continue with its consideration of A/CN.9/WG.V/WP.128 at its forty-eighth session. The Secretariat informed the Working Group that it would provide a revised version reflecting the proposals made to amend draft articles 2 to 8.

VI. Cross-border recognition and enforcement of insolvency-related judgements

47. The Working Group commenced its discussion of this topic on the basis of the draft model law on the recognition and enforcement of insolvency-related judgements contained in document A/CN.9/WG.V/WP.130 (draft model law).

Preamble

48. A proposal to make it clear that the adoption of the draft model law would not imply that the Model Law did not permit the enforcement of insolvency-related judgements received some support. It was also suggested that the relationship between the two instruments could be clarified in the substantive provisions of the draft model law. It was observed that since both instruments were model laws, the question of any overlap between them would have to be addressed by the enacting State.

Article 1. Scope of application

49. Several observations were made in respect of the need to take into consideration existing international and regional instruments, as well as those under development, in order to avoid overlap and to ensure that there were no gaps in terms of the scope of application of the draft model law. The Working Group agreed that these considerations should be borne in mind as the work developed.

50. It was suggested by some that the scope of application as well as the definition of "insolvency-related judgement" be quite open, with few conditions and that

grounds to refuse recognition be dealt with in draft article 10. Some reservations were expressed.

51. A number of proposals were made with respect to the drafting of article 1, paragraph 1, including simplifying the current text to read instead: "This Law applies to the recognition and enforcement of an insolvency-related judgement by a foreign representative or other person entitled to seek enforcement of such a judgement." A contrary view was expressed that the scope of application should cover both inbound and outbound requests for recognition and enforcement and that subparagraph 1(b) should thus be retained.

52. Another proposal was to adopt drafting based on article 1, paragraph 1 of the New York Convention, along the following lines: "This Law applies to the recognition and enforcement of insolvency-related judgements ordered in proceedings taking place in a State that is different to the State of execution."

53. The Secretariat was requested to prepare alternative versions of draft article 1 reflecting the above suggestions for future consideration by the Working Group.

Article 2. Definitions

(a) "Foreign proceeding"

54. It was noted that in order to align the draft definition with that contained in the Model Law, the word "foreign" should be inserted before the word "court". In addition, in order to avoid any issues relating to the current status of the foreign proceeding, the words along the lines of those in square brackets should be included and the brackets deleted. There was also a suggestion that a definition of "foreign court" and "proceeding" could be added to the draft model law; it was noted that in the context of the European Insolvency Regulation, the question of whether the court was the insolvency court or another court was not relevant.

(b) "Foreign representative"

55. The Working Group did not have comments on the draft definition in subparagraph (b).

(c) "Judgement"

56. Some support was expressed in favour of requiring a judgement to be final, although it was noted that such an addition would be inconsistent with the reference to provisional measures. It was noted that draft article 10, subparagraph (a) dealt with the question of finality as a ground for refusing recognition. Concern was expressed as to the inclusion of administrative decisions, although it was noted that if such decisions were not included, it could create a gap in some jurisdictions. It was also suggested that the only provisional measures that should be included were protective and conservatory measures.

(d) "Insolvency-related judgement"

57. A suggestion to simplify draft subparagraph (d) included retaining the first sentence and, in the second sentence, deleting the words in the chapeau following "if it has an effect upon the insolvency estate of the debtor" to the end of the third sentence (possibly including the content of the third sentence in a guide to enactment), and adding language to better define the meaning of the word "effect" along the lines of that contained in draft subparagraph (v), variant 1. A different view was that the second sentence of the chapeau of subparagraph (d) should be retained as drafted, with a slight revision to (ii) to delete the words "and legal basis". Another suggestion was to add the substance of footnote 6 either in the text or in a guide to enactment of the draft model law, while an additional proposal was made to emphasize that the list was not exclusive by including the phrase "inter alia" in the final phrase of the chapeau.

58. Various concerns were expressed with respect to some of the matters included in subparagraph (d). It was suggested, for example, that items (vi), (vii), (x) and (xii) were closely related to the question of recognition under the Model Law and should not be included here; and since item (ii) might be based on contract, general rules of enforcement should apply rather than the draft model law. It was observed that a gap might be created by limiting judgements to those issued after commencement, as it would exclude preservation measures granted between application for, and commencement of, insolvency proceedings.

59. No clear preference was expressed in favour of variant 1 or 2 of item (v). Further, a suggestion was made that it could be helpful to add a catch-all paragraph along the lines of "any judgement related to insolvency that is not enforceable under another instrument".

60. A reservation was expressed as to draft item (vi) of subparagraph (d) because it might cause a conflict between the current draft model law and the Model Law. With respect to item (viii), it was suggested that the current drafting might be too narrow, as it would not allow a cause of action to be pursued by a party to whom it had been assigned by, for example, the foreign representative. A reservation was also expressed as to the inclusion of provisional measures.

Articles 3 to 7 and 11 to 12

61. The Working Group had no comments on draft articles 3 to 7 and 11 to 12. Article 8. Recognition and enforcement of an insolvency-related judgement

62. The Working Group identified some issues for further consideration, including which party could seek recognition and enforcement under an insolvency-related judgement; and the issue of the finality of the judgement in relation to subparagraph 2(b) of the draft article.

63. The following specific drafting proposals were made:

(a) To include the contents of footnote 18 in the text of draft article 8 at the end of paragraph 1 as follows: "Enforcement may be by way of the rights created or recognized by the judgement or order to be pleaded by way of defence.";

(b) To merge paragraph 1 and the chapeau of paragraph 2;

(c) To revise draft subparagraph 2(b) to add words along the lines of "certified statement of the final character of the judgement"; and

(d) To clarify the meanings of "recognition" and "enforcement" in the draft article, as not all judgements required enforcement.

Article 9. Decision to recognize and enforce an insolvency-related judgement

64. A proposal was made to delete subparagraph (a) as redundant. Concern was again expressed as to the relationship between the procedure for recognizing an insolvency-related judgement and the procedure for recognizing foreign proceedings under the Model Law; in particular, it was questioned what would happen to the recognition of an insolvency-related judgement if the underlying insolvency proceedings were found to be manifestly contrary to public policy under the Model Law.

Article 10. Grounds to refuse recognition of an insolvency-related judgement

65. The Working Group recalled its agreement (see paragraph 49 above) to take into consideration existing instruments and those under development in its deliberations on the draft text. It was further recalled that the mandate given to the Working Group was very broad and not constrained by existing mechanisms for recognition and enforcement of insolvency-related judgements, including existing grounds for refusing such recognition and enforcement.

66. A proposal was made to add an additional variant 3 to draft subparagraph (i) along the lines of: "Where the party against whom recognition is sought is the debtor

in the proceedings giving rise to the insolvency-related judgement, if such proceedings were not initiated at the debtor's COMI. In all other cases, where the judgement party did not have its COMI in, or where it did not consent to the exercise of the jurisdiction of, the originating State." Although that proposal received some support, serious reservations as to its inclusion were expressed, in particular, that a blanket refusal to recognize on the basis that the insolvency-related judgement did not emanate from the debtor's COMI would be too restrictive to be useful in practice.

67. An additional proposal was made to change subparagraph (h) to read along the following lines: "Recognition of the insolvency-related judgement has been refused by a judgement from the State where the foreign proceeding has been opened, or if no judgement on recognition has been rendered in the State where the foreign proceeding has been opened, the court from which recognition is sought determines that the insolvency-related judgement is not susceptible to recognition under the laws of the State where the foreign proceeding has been opened."

68. Other suggestions included: the need to add as a ground for refusal a failure to meet the requirements of article 8, paragraph 2; that draft article 10, subparagraphs (f) and (g) should be limited to those circumstances where the prior or earlier judgement had final and binding effect; the need to address the potential overlap between subparagraphs (c), (d) and (e); to add a reference in subparagraph (d) to the content of the insolvency-related judgement being manifestly contrary to public policy; and whether reference should be added to address the treatment of in rem judgements.

69. The Working Group acknowledged that its deliberations at the current session represented a preliminary exchange of views and that all of the proposals made with respect to the draft text would be reflected as additional variants in a future iteration of the text.

F. Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups

(A/CN.9/WG.V/WP.128)

[Original: English]

Contents

Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014) and forty-sixth (December 2014) sessions.

2. This note addresses two areas of relevance to the cross-border treatment of enterprise group insolvency, drawing upon the issues discussed and the points agreed at the forty-sixth session of Working Group V (December 2014).[2] Part I focuses on the provisions of domestic law that may be required to enable enterprise groups to address financial distress through a coordinated group insolvency solution developed for the group as a whole or for some of its parts. This part covers several issues, such as commencement of insolvency proceedings, procedural coordination and the participation of solvent group members, that are covered by the UNCITRAL Legislative Guide on Insolvency Law, part two and part three, chapter II (the

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

[2] For the report of the forty-sixth session, see document A/CN.9/829.

Legislative Guide) and typically would be included in a domestic insolvency law, rather than in a legislative framework for cross-border recognition and assistance. However, the existence of domestic law provisions addressing those issues is likely to be of considerable assistance in developing and implementing a group insolvency solution in the cross-border context.

3. Part II focuses on a cross-border recognition regime and provides a set of draft legislative provisions that is based on the concepts and structure of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and addresses recognition, relief and cooperation in cross-border insolvency proceedings concerning members of an enterprise group. The draft legislative text responds to numerous comments made at the forty-sixth session of Working Group V that it is difficult to identify the topics and manner in which they should be addressed in order to better facilitate the cross-border insolvency of enterprise groups without seeing the outline of a draft legislative text and understanding the possible structure of enterprise group insolvency solutions.

4. Without seeking to pre-empt the decision the Working Group must make as to the form a text on the cross-border insolvency of enterprise groups might take, the draft text set out in part II provides a set of provisions that would be enacted by a State to provide a regime for cross-border recognition of, and assistance for, foreign insolvency proceedings concerning group members, where those proceedings are a part of what, for the moment, is termed a "group insolvency solution". Those provisions could form an additional part of the Model Law or be developed as a stand-alone instrument.

5. The common purpose of a "group insolvency solution" would be the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those members of the enterprise group. Such a solution may involve multiple insolvency proceedings, possibly commenced in several States, that are coordinated through one (or, if necessary, several) jurisdiction(s). It is intended to be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific group, its structure, business model, degree and type of integration between group members and so forth.

6. Several scenarios are included in the Annex to this paper (referred to as Scenarios 1 and 2) to facilitate discussion of the more complex points of developing and implementing a group insolvency solution. References to the scenarios are made throughout the following discussion.

7. The draft provisions are based on a "foreign group proceeding", which is defined to be a foreign proceeding (as defined in the Model Law) that is participating in a group insolvency solution. The draft text makes no distinction between main and non-main insolvency proceedings; proceedings that might, be regarded as main or non-main proceedings under the Model Law are to be recognized under this regime as a foreign group proceeding if they are shown to be participating in the development and implementation of a group insolvency solution. The consequences of the distinction between main and non-main proceedings in the Model Law (i.e. the relief available automatically on recognition of a main proceeding) are not part of this draft, which provides that relief is available on a discretionary basis for all recognized proceedings.

8. In addition to recognition, the draft provisions include:

(a) Provisional relief, based on article 19 of the Model Law and available once an application for recognition has been made and relief is urgently required;

(b) Relief available on recognition of the foreign group proceeding. This provision is based on articles 20 and 21 of the Model Law, with additional forms of relief that are likely to be required in the group context. At this stage, no provision has been included for automatic relief and the Working Group may wish to consider whether the draft should include any relief or other effects that would apply

automatically on recognition of a foreign group proceeding, similar to those effects specified in articles 12, 20, 23 and 24 of the Model Law; and

(c) Cooperation involving courts and foreign representatives, based upon the recommendations of the Legislative Guide, part three, chapter III.

9. A number of articles of the Model Law are not repeated as they would principally be relevant only if the text to be developed was a stand-alone model law.[3] The scope and relevance of those articles to any text being developed would need to be considered.

10. Certain new terms are suggested in the draft provisions (see article 2) to capture concepts relevant to the group context; the Working Group may wish to consider the suitability of that terminology.

I. Provisions for possible inclusion in domestic insolvency law

A. Introduction

11. Enterprise groups that do business across borders are often characterized by complex vertical or horizontal structures and varying degrees of integration and interrelationship between group members. Those interrelationships, which typically determine how the group operates and is structured when the business is solvent, may be disturbed by the onset of financial difficulty affecting one, some or even all of the group members that can lead to insolvency. Problems can arise in insolvency simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Where the group business depends upon some degree of integration between group members, concerning for example provision of financing, components, raw materials and intellectual property, the effect of insolvency on those relationships and the possibility that multiple insolvency proceedings may commence for the multiple separate legal entities within the group can make reorganization of the group's business (whether in whole or part) impossible.

12. Part three, chapter II of the Legislative Guide proposes a number of mechanisms, such as joint application for commencement, procedural coordination and in limited circumstances, substantive consolidation (Legislative Guide, part three, recs. 199-210 and 219-231), that are designed to facilitate the insolvency treatment of enterprise groups, albeit in a domestic context. Chapter III, which deals with international considerations, does not include analogous provisions, but rather focuses on extending the cooperation and coordination provisions of the Model Law to cover multiple proceedings in different jurisdictions concerning different group members.

13. Some consideration might be given to the extent to which the recommendations of part three, chapter II of the Legislative Guide would be relevant in the cross-border context and thus might be included in a revised legislative form in a new text. The following issues have been identified as raising particular concerns in the enterprise group context and might also be the subject of legislative provisions.

B. Commencement of insolvency proceedings

14. A key issue in facilitating the cross-border insolvency of groups relates to whether and how insolvency proceedings for multiple group members might be concentrated in a single or a limited number of jurisdictions. In both Scenarios 1 and 2 of the Annex, this issue is relevant to commencement of proceedings in State C for D, E and G (Scenario 1) and D, E and F (Scenario 2). The following

[3] For example, arts. 3 to 14.

discussion is framed in the context of a number of group members participating in a group insolvency solution.

1. Centralizing proceedings relating to group members

15. As previously noted (A/CN.9/WG.V/WP.124, para. 13), several cases have occurred in practice in which the centre of main interests (COMI) of a number of group members has been determined to be located in the same jurisdiction, as shown in Scenario 2. Such a determination may be based upon factors of the kind referred to in paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law, in particular that such a jurisdiction is where the central administration of the various group members takes place. Other factors may also be relevant to determining COMI in a group context. These may include the connection and level of integration and reliance between the particular group members by virtue of their group membership and that development and implementation of a group insolvency solution (whether for the whole group or separate parts) will require the participation of certain group members (see Scenarios 1 and 2). While the COMI of each of the members of the enterprise group may be found to be located in one place, it is more likely to occur with respect to distinct parts or divisions of the group that can be reorganized separately. There may be several such locations within one enterprise group (as shown in Scenario 1).

16. Legislative provisions giving effect to the substance of paragraphs 145-147 of the Guide to Enactment and Interpretation and to other factors that might be relevant to the determination of the COMI of group members might be of assistance in developing and implementing a group insolvency solution through one or several central coordinating jurisdiction(s).

17. Even when the COMI of several or many group members is determined to be located in one place, insolvency proceedings for those group members might still be required in other places to deal with assets, business affairs and creditor claims in those places. Those proceedings might be akin to non-main proceedings under the Model Law were that distinction to be used. Additional measures might be required to assist the conduct of those proceedings and their coordination with the proceedings taking place at C in Scenario 2. These might include measures enabling the claims of creditors in D, E and F to be treated in the proceedings in C under the laws of D, E and F and measures limiting the commencement or continuation of insolvency proceedings in D, E and F. While some of those measures might be available as forms of relief additional to those available under articles 20 and 21 of the Model Law under a recognition regime as discussed below in part II, the enactment of relevant provisions in domestic laws might also be required.

2. The COMI of group members is in different locations

18. A different situation will arise where the COMIs (determined in accordance with the types of factors indicated above) of only a limited number of group members are located in the same jurisdiction, as indicated in Scenario 1. While that situation may prove sufficient to enable that jurisdiction to function as the coordinating centre of the group insolvency solution, other group members that do not have their COMI in that jurisdiction may be treated in several ways:

(a) Proceedings for those other group members (in Scenario 1, companies D, E and G) might commence in C on the basis of criteria such as the location of an establishment or the presence of assets, if applicable. Those proceedings might be analogous to non-main proceedings under the Model Law;

(b) Creditors in D, E and G (Scenario 1) do not seek to commence proceedings in those jurisdictions, but are notified of the proceedings taking place in C;[4]

(c) The claims of creditors of companies D, E and G arising in those jurisdictions on the basis that they are the location of the COMIs of D, E and G, may

[4] This possibility is suggested in document A/CN.9/829, para. 45.

be treated in C under the laws of D, E and G respectively, subject to safeguards protecting the interests of those creditors and approval by the courts of D, E and G;

(d) Proceedings for companies D, E and G may commence in D, E and G respectively on the basis of the location of their COMIs. Where a group insolvency solution is being pursued, it is desirable that these other proceedings assist the achievement of that group insolvency solution as much as possible through coordination and cooperation and be limited, as far as possible, to the assets and business affairs of the group member in D, E or G (analogous to the type of proceeding that may be commenced following recognition of a foreign main proceeding under article 28 of the Model Law);

(e) The courts in D, E and G might decline to commence proceedings in those jurisdictions in favour of the proceedings taking place in C, on criteria along the lines of those set forth in paragraph 32 of A/CN.9/WG.V/WP.124. [5] Alternatively, proceedings may commence in D, E and G, but be stayed or suspended pending the outcome of the proceedings in C and implementation of the group insolvency solution; or

(f) Where COMI-based proceedings commence in D, E or G and measures of the type available in paragraphs (c) or (e) are not available or those proceedings cannot be limited to local assets and affairs as indicated in paragraph (d), the proceedings in D, E or G will run in parallel with the proceedings in C. Development and implementation of a group insolvency solution must be achieved through coordination and cooperation. The more dispersed the proceedings are, the greater the reliance on coordination and cooperation in order to implement a group insolvency solution.

C. Participants

19. At its forty-sixth session, the Working Group recognized the need to identify the parties, including creditors and other stakeholders, that should be permitted to participate in proceedings directed towards achieving a group insolvency solution and to consider whether that participation might be facilitated by appointment of a representative (A/CN.9/829, para. 52). Participation and representation of creditors is discussed in some detail in recommendations 126-136 of the Legislative Guide. In the cross-border context, a foreign creditor's right of participation is recognized in article 13 of the Model Law, although it is limited to what is permitted for creditors under the law of the enacting State. In the enterprise group context, creditor participation is discussed in the Legislative Guide, part three, chapter II, paragraph 26.

20. In addition to creditors, there are other stakeholders who may have an interest in participating in insolvency proceedings in the group context. These stakeholders may fall within the term "parties in interest" as explained by the Legislative Guide (subpara. 12 (d) (d)), which recommends that they have a right to be heard and to appeal (rec. 137), or within the phrase "interested persons" as used in the Model Law (e.g. Preamble, arts. 1 and 22). Article 22 requires the court to ensure the interests of those persons are protected when relief is ordered.

21. An important aspect of the issue of participation in the group context concerns which creditors and other stakeholders of which group members are being considered. Where a solution for a number of group members is being developed, the insolvency representatives of those group members will clearly need to be involved, whether individually or through a committee that might be formed by the different insolvency

[5] These criteria included that the proceedings in D, E or G: (a) lacked purpose; (b) would not improve the protection of stakeholder interests in D, E or G, which could be adequately protected in the proceedings in C; (c) would not improve the realization of assets located in D, E or G; (d) were not required to address claims or realization of assets in D, E or G; (e) would impede achievement of the purpose of the proceedings in C; (f) were not in the global best interests of the enterprise group as a whole; and (g) were opposed by the insolvency representative of the proceedings in country C.

representatives of the members participating in a group solution (discussed further below). Other parties that may need to participate (leaving aside for separate consideration the extent of that participation) may include creditors of those group members, solvent group members whose participation is necessary to the success of the group solution (see below), and possibly other stakeholders. Some of the issues relating to participation might be resolved through the use of cross-border insolvency agreements, referred to in draft articles 10 and 17 below.

22. As to the proceedings in which participation of those parties might be relevant, a broad approach might be desirable. It may be relevant in Scenario 1, for example, for a representative of the creditors of D to participate in proceedings in E as well as in G. In other words, creditors' interests might need to be represented more widely than in the proceedings of the member of which they are creditors, especially when that member is participating in a more broadly-based insolvency solution.

23. The Working Group may wish to consider whether any of the recommendations referred to above should be reframed as legislative provisions for inclusion in a legislative regime addressing enterprise groups and whether additional provisions may be required.

D. Solvent group members

24. At its forty-sixth session, the Working Group also recognized the need to consider voluntary participation of solvent group members, as well as their creditors and other stakeholders, in reorganization proceedings. The Legislative Guide, part three, paragraph 152 and recommendation 238 suggest the inclusion of specific provisions in domestic law. Appointment of a representative of a solvent group member to act in relevant insolvency proceedings relating to a group insolvency solution might also be required.

E. Summary of part I

25. Part I has outlined a number of topics for possible treatment in a draft legislative text addressing enterprise groups, including:

(a) Recommendations of part three, chapter II of the Legislative Guide such as joint application for commencement, procedural coordination and substantive consolidation;

(b) Factors relevant to determination of the COMI of an enterprise group member, including those outlined in paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law and additional factors specific to enterprise groups;

(c) The possibility of supporting the implementation of a group insolvency solution by limiting the commencement or continuation of some proceedings; limiting the scope of some proceedings commenced to local assets; declining to commence proceedings in deference to foreign proceedings; and recognizing and approving the treatment of creditor claims in foreign proceedings;

(d) Permitting the participation of solvent group members in a group insolvency solution; and

(e) Identifying those creditors and other stakeholders that might participate in proceedings that are part of a group insolvency solution and considering the means of facilitating that participation; for that purpose recommendations from the Legislative Guide, parts two and three might be relevant.

II. Draft legislative provisions on the cross-border insolvency of enterprise groups

Preamble

The purpose of these provisions is to address the structure and conduct of cross-border insolvency proceedings taking place in more than one State concerning two or more members of an enterprise group in a manner that:

(a) Facilitates the development of a range of approaches to the resolution of insolvency, whether affecting the whole or part of the enterprise group;

(b) Takes account of the particularities of the enterprise group context, including the need to address [independent] [integrated] businesses conducted through the separate legal entities that comprise the enterprise group;

(c) Fosters coordination of and cooperation between insolvency proceedings affecting members of an enterprise group;

(d) Permits the participation of any group member, whether solvent or insolvent, that is affected by the insolvency of other group members; and

(e) Facilitates reorganization, going concern sale or liquidation of businesses in a manner that maximizes value and protects the interests of creditors and other stakeholders of affected group members.

A. General Provisions

Article 1. Scope of application[6]

1. These provisions apply in the context of the insolvency of one or more members of an enterprise group where:

(a) Assistance is sought in this State by a foreign court, a foreign group representative or an enterprise group member in connection with a foreign group proceeding [concerning an enterprise group member] [relating to an enterprise group insolvency solution]; or

(b) Assistance is sought in connection with a proceeding under the law of this State in a foreign State where a foreign group proceeding [concerning an enterprise group member] [relating to an enterprise group insolvency solution] is pending or has been applied for; or

(c) A foreign group proceeding and a proceeding under the law of this State [concerning an enterprise group member] [relating to an enterprise group insolvency solution] are taking place concurrently; or

(d) Creditors of different group members, group members other than those subject to insolvency proceedings or other interested persons have an interest in requesting the commencement of, or participating in, a proceeding under the law of this State.

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

[6] UNCITRAL Model Law on Cross-Border Insolvency, art. 1.

Article 2. Definitions

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[7]

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;[8]

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;[9]

(d) "Enterprise group member" means an enterprise referred to in subparagraph (b);

(e) "Foreign group member representative" means a person or body, including one appointed on an interim basis, authorized in a [foreign group] proceeding [referred to in subparagraph (h)] to administer the reorganization or the liquidation of the assets or affairs of a debtor that is an enterprise group member or to act as a representative of such a proceeding;[10]

(f) "Enterprise group committee" means a committee comprising foreign group member representatives;

(g) "Enterprise group committee representative" means a person or body designated by an enterprise group committee to act as its representative;

(h) "Foreign group 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 a debtor that is a member of an enterprise group are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation in [the context of] an enterprise group insolvency solution;[11]

(i) "Enterprise group insolvency solution" means a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. An enterprise group insolvency solution may be coordinated through a proceeding in a State that is the centre of main interests of at least one enterprise group member.

B. Recognition of a foreign proceeding and relief

Article 3. Recognition of a foreign group proceeding[12]

1. A foreign group member representative[13] may apply to the court for recognition of a foreign group proceeding.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign group proceeding and appointing the foreign group member representative; or

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[7] UNCITRAL Legislative Guide on Insolvency Law, part three, Introduction, subpara. 4 (b) and footnote 3.

[8] Ibid., subpara. 4 (a).

[9] Ibid., subpara. 4 (c).

[10] Based on Model Law, art. 2, subpara. (d). It is assumed, as in the Model Law, that the foreign representative could also be a debtor in possession: see Guide to Enactment and Interpretation, para. 71.

[11] Based on Model Law, art. 2, subpara. (a).

[12] Ibid., art. 15.

[13] As appropriate, the following articles that refer to the foreign group member representative could also apply to an enterprise group committee representative, where such a committee was formed.

(b) A certificate from the foreign court affirming the existence of the foreign group proceeding and of the appointment of the enterprise group member representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign group proceeding and of the appointment of the foreign group member representative.

3. An application for recognition shall also be accompanied by evidence that:

(a) A group insolvency solution [is being developed] [has been developed] for the whole or a part of the enterprise group;[14]

(b) There is a reasonable prospect of implementing the group insolvency solution; and

(c) The foreign group proceeding is [a necessary or integral part of] [participating in] the group insolvency solution.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 4. Presumptions concerning recognition[15]

1. If the decision or certificate referred to in article 3, paragraph 2 indicates that the foreign group proceeding is a proceeding within the meaning of article 2, subparagraph (h) and that the foreign group member representative is a person or body within the meaning of article 2, subparagraph (e), the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, a group member's registered office or principal place of business[16] is presumed to be the centre of that group member's main interests.[17]

Article 5. Decision to recognize a foreign group proceeding[18]

1. [Subject to any applicable public policy exception,] [19] a foreign group proceeding shall be recognized if:

(a) The foreign group proceeding is a proceeding within the meaning of article 2, subparagraph (h);

(b) The foreign group member representative applying for recognition is a person or body within the meaning of article 2, subparagraph (e);

(c) The application meets the requirements of article 3, paragraph 2;

(d) The application has been submitted to the court referred to in article ...;[20] and

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[14] Details of the evidence required to satisfy these requirements could be developed as substantive provisions or included in any commentary or guide to enactment accompanying the text.

[15] Model Law, art. 16.

[16] Principal place of business has replaced the reference in art. 16, para. 3 of the Model Law to "habitual residence" on the basis that while the latter is unlikely to be relevant to the enterprise group context, principal place of business may be relevant for unincorporated group members.

[17] As noted above in para. 14, the factors that are relevant to determination of the centre of main interests in the group context may be wider than those applicable in the case of a single debtor. This could be explained in any commentary or guide to enactment accompanying this text and the relevant factors enumerated.

[18] Model Law, art. 17.

[19] It may be appropriate to include in the draft text an article along the lines of art. 6 of the Model Law.

[20] It may be appropriate to include in the draft text an article along the lines of art. 4 of the Model Law.

(e) The requirements of article 3, paragraph 3, are met.

2. An application for recognition of a foreign group proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 4, the foreign group member representative shall inform the court of changes in the status of the foreign group proceeding or in the status of their own appointment occurring after the application for recognition is made.[21]

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding[22]

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign group member representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a foreign group proceeding or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the enterprise group member's assets;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements;

(e) Any relief mentioned in article 7, paragraph 1.

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 7, subparagraph 1(g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [foreign group proceeding] [group insolvency solution].

Article 7. Relief that may be granted upon recognition of a foreign group proceeding[23]

1. Upon recognition of a foreign group proceeding, where necessary to protect the assets of the enterprise group member or the interests of creditors and facilitate the implementation of a group insolvency solution, the court may, at the request of the foreign group member representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;

[21] Based on the Model Law, art. 18.

[22] Based on the Model Law, art. 19.

[23] This article is based upon arts. 20 and 21 of the Model Law, with some additions.

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member to enable a group insolvency solution to be developed;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

(e) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution and authorizing the continued provision of finance under those funding arrangements where the funding entity is located in this State;

(i) Subject to article 8, approving treatment in the foreign group proceeding of the claims of creditors located in this State; or

(j) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a foreign group proceeding the court may, at the request of the foreign group member representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the foreign group member representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Article 8. Protection of creditors and other interested persons[24]

1. In granting or denying relief under article 6 or 7, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[25]

2. The court may subject relief granted under article 6 or 7 to conditions it considers appropriate.

3. The court may, at the request of the foreign group member representative or a person affected by relief granted under article 6 or 7, or at its own motion, modify or terminate such relief.

[24] Model Law, art. 22.

[25] Any commentary or guide to enactment prepared to accompany this draft text might explain in more detail the notion of adequate protection and the standard that might be applicable, for example, that creditors of the enacting State whose claims are to be treated in the foreign group proceeding under draft article 7 (1)(i) should be no worse off than if those claims were treated in a proceeding under the laws of the enacting State. The Working Group may wish to consider whether this standard should be specified in draft article 8.

C. Cooperation with foreign courts and foreign representatives

Article 9. Cooperation and direct communication between a court of this State and foreign courts or foreign group member representatives[26]

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign group member representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court to facilitate the development and implementation of a group insolvency solution.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign group member representatives concerning members of the same enterprise group and in particular with respect to implementation of a group insolvency solution and the role of the respective courts when such a solution is to be implemented.

Article 10. Cooperation to the maximum extent possible under article 9[27]

Cooperation to the maximum extent possible for the purposes of article 9 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;[28]

(b) Participation in communication with the foreign court or foreign group member representative;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members [subject to foreign group proceedings] [participating in a group insolvency solution];

(d) Coordination of concurrent foreign group proceedings;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval of the treatment of creditors of the enacting State in a foreign group proceeding;

(g) Approval of cross-border insolvency agreements to facilitate the implementation of a group insolvency solution;[29] and

(h) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 11. Conditions applicable to cross-border communication involving courts[30]

Communication for the purposes of article 9, paragraph 2, is subject to the following conditions:

(a) The time, place and manner of communication shall be determined between the courts or between the courts and foreign group member representatives;

(b) Notice of any proposed communication shall be provided to interested persons in accordance with applicable law;

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[26] Legislative Guide, part three, recs. 240 and 242.

[27] Ibid., rec. 241.

[28] This might include providing to the foreign court or the foreign group member representative 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 foreign group proceedings.

[29] See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

[30] Legislative Guide, part three, rec. 243.

(c) A foreign group member representative is entitled to participate in a communication. An interested person 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 shall be treated as confidential only in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

(f) Communication should respect: (i) the mandatory rules of the jurisdictions involved in the communication; (ii) the substantive and procedural rights of interested persons; and (iii) the confidentiality of information.

Article 12. Effect of communication under article 9[31]

Participation by a court in communication pursuant to article 9, paragraph 2 does 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 or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts. Each court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

Article 13. Coordination of hearings[32]

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of parties and the jurisdiction of each court may be safeguarded by reaching agreement on the conditions to govern the coordinated hearings.[33]

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 14. Cooperation and direct communication between the [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and foreign courts and foreign group member representatives[34]

1. In the matters referred to in article 1, the [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] shall, in the exercise of its functions and

[31] Ibid., rec. 244.
[32] Ibid., rec. 245.
[33] These conditions might include: 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.
[34] Legislative Guide, part three, recs. 246 and 248.

subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign group member representatives to facilitate the development and implementation of a group insolvency solution.

2. The [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] is entitled, 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 and foreign group member representatives.

Article 15. Cooperation to the maximum extent possible under article 14[35]

For the purposes of article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members participating in a group insolvency solution, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of cross-border insolvency agreements to facilitate the implementation of a group insolvency solution;

(c) Allocation of responsibilities between [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and foreign group member representatives;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members [subject to foreign group proceedings] [participating in a group insolvency solution];[36] and

(e) Coordination with respect to the proposal and negotiation of reorganization plans.

Article 17. Authority to enter into cross-border insolvency agreements[37]

A cross-border insolvency agreement may be entered into to facilitate the implementation of a group insolvency solution.

Article 18. Appointment of a single or the same insolvency representative[38]

1. The court may coordinate with foreign courts with respect to the appointment of a single or the same group member representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the group member representative is qualified for appointment in each of the relevant States.

2. To the extent required by applicable law, the group member representative is subject to the supervision of each appointing court.

D. Coordination of concurrent proceedings

Chapter V, articles 28 to 32 of the Model Law address issues of coordination between concurrent proceedings and the adjustment of relief between the different proceedings. The Working Group may wish to consider whether provisions of that nature are required in a new text and if so, the content of those provisions.

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[35] Ibid., rec. 250.

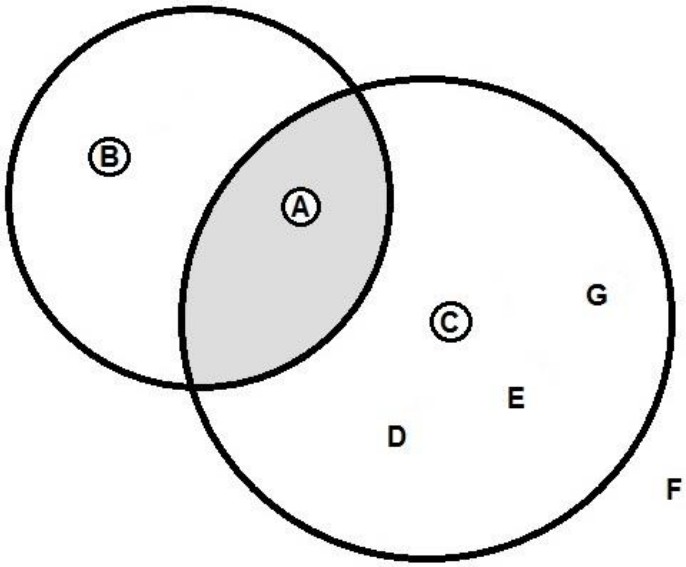
[36] This may include: day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; exercise of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors.

[37] UNCITRAL Legislative Guide, rec. 253.

[38] Ibid., rec. 251.

Annex

Scenario 1

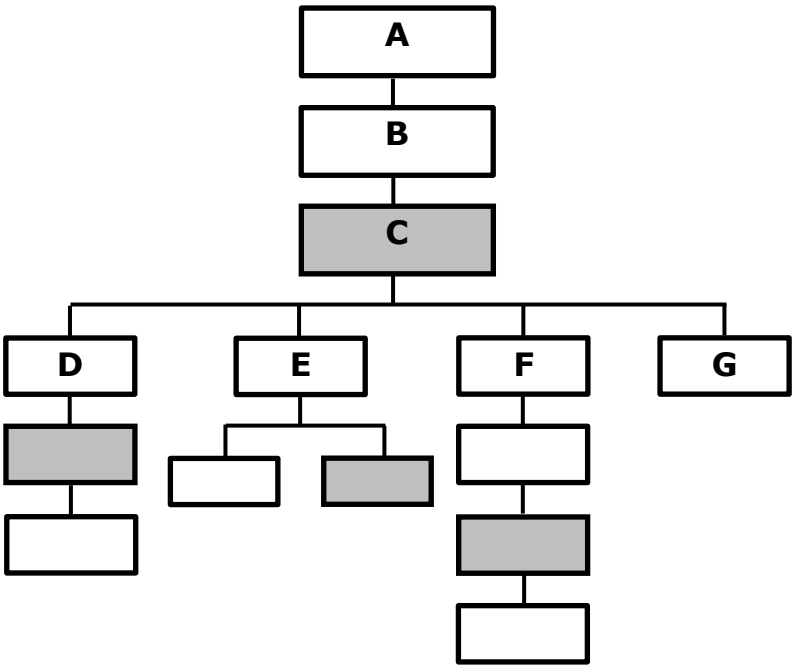


1. Scenario 1 represents an enterprise group with seven separate legal entities, each with its COMI in a different jurisdiction. Two "group solutions" are proposed: the first centred in jurisdiction B (involving entity B and some of entity A's assets or operations) and the second centred in jurisdiction C (involving entities C, D, E, G and some of entity A's assets or operations). F is a group member not involved in either group solution.

2. To facilitate those group solutions, the proceedings in C would need to be able to obtain relief from the courts in the other relevant jurisdictions. For example, the representatives of proceedings in C would need to appear in jurisdiction D and request relief regarding the assets or operations of entities A, C, D, E and G (if any) located in jurisdiction D. It should be possible to request such relief even though the COMIs of most of those entities are not in C (meaning that the proceeding in C would, under the existing Model Law, not be seen as the "main" proceeding for A, D, E and G), and even though jurisdiction D might normally see itself as the proper jurisdiction for a main proceeding for entity D.

3. Similarly, the court in A would need to be able to provide or coordinate relief in response to separate requests from B and C, regarding the two separate group solutions, even though entity A's COMI is in A. Scenario 1 does not depict the ownership structure of the group (unlike Scenario 2) but only its geographic distribution. The legislative provisions that might be required to facilitate development and implementation of a group insolvency solution are discussed in above in part I.

Scenario 2



1. Scenario 2 represents a company with two major product lines. Product 1 is manufactured, sold and installed by subgroups D and E and product 2 by subgroup F. Company G is a solvent sales company in another jurisdiction, but D, E, F and G all have inter-company indebtedness to C. With the exception of C and F, which are co-located, the other group companies are located in different States. The overall group COMI is in State C; this is not disputed. The main asset-owning companies are shaded on the chart. Management faces three possibilities:

(a) Addressing the insolvency and restructuring of C, keeping all subsidiaries whole;

(b) As in (a), but also involving insolvencies and restructuring of D, E and F if it proves necessary to control the actions of creditors or if material debt forgiveness is required by the creditors of those companies, with the same office holders being appointed to C, D, E and F based on the group COMI being located in State C; or, as a last resort,

(c) If (b) is not possible for any reason, such as a holdout by creditors of D, there will be attempts to restructure the businesses of D and E together, based on the COMI of D and, separately, of C and F together based on the shared COMI.

G. Note by the Secretariat directors' obligations in the period approaching insolvency: enterprise groups

(A/CN.9/WG.V/WP.129)

[Original: English]

Contents

Introduction

1. Part three of the UNCITRAL Legislative Guide on Insolvency Law deals with the treatment of enterprise groups in insolvency and provides background on the nature of enterprise groups; reasons for conducting business through enterprise groups; what constitutes an enterprise group by reference to concepts such as ownership and control; and regulation of enterprise groups. Part four of the Legislative Guide addresses the obligations of directors in the period approaching insolvency, discussing issues associated with directors' obligations in that period and, in particular, the rationale for imposing obligations specific to that period by way of the operation of insolvency, rather than corporate, law. Neither part addresses the specific issues that might affect the obligations of directors who perform that function for one or more enterprise group members.

2. At its forty-fourth session (December 2013), the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted possible solutions needed to be considered carefully so that they did not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's obligations to its own company and the interests of the group) would be helpful.

3. Deliberations on this topic commenced at the Working Group's forty-sixth session (December 2014) on the basis of a draft prepared by the Secretariat following consultation with an informal expert group as requested by the Working Group (A/CN.9/WG.V/WP.125).

4. This note has been prepared by the Secretariat on the basis of the deliberations and conclusions of the Working Group at its forty-sixth session (December 2014) (A/CN.9/829, paras. 12-32). Set out below are revisions to draft

recommendations 267 to 270 (previously numbered 255 (EG), 256 (EG), 256 (EG) (bis) and 256 (EG) (ter)), together with the first draft of an accompanying commentary. In accordance with the decision of the Working Group, the text has been prepared as an additional section of part four of the Legislative Guide. Notes for the Working Group on revisions to the recommendations are included in the footnotes.

UNCITRAL Legislative Guide on Insolvency Law, part four: Directors' obligations in the period approaching insolvency — enterprise groups

Introduction and purpose of this section

1. This section of part four builds upon recommendations 255 to 266 of the first section, which address the obligations of directors of an individual company in the period approaching insolvency. Focusing on the nature of the obligations and the steps that might be taken to discharge those obligations (as established in recommendations 255 and 256), this section proposes how those recommendations could be revised for application in the context of enterprise groups. Recommendations 257 to 266 of the first section of part four continue to apply in the enterprise group context as drafted, however cross-references in those recommendations to recommendations 255 and 256 should be read as references to recommendations 267 and 268.

2. Additional recommendations (recommendations 269 and 270) have been drafted to address the situation where a director is appointed to, or holds a managerial or executive position in, more than one group member and conflicts arise in discharging the obligations owed to the different members.

3. This section uses the same terminology as other parts of the Legislative Guide. To provide orientation to the reader, this section should be read in conjunction with part three and the first section of part four.

I. Background

4. The first section of part four of the Legislative Guide considers the obligations of directors of individual companies in the period approaching insolvency, providing information on how those obligations are treated under current laws. While some jurisdictions have developed provisions to impose obligations on directors in the period approaching insolvency, the relative advantages and disadvantages of such regimes remain the subject of debate.[1] The first section of part four underlines the need for early action to be taken when businesses face financial difficulty in order to avoid rapid decline and to facilitate rescue and reorganization. It also notes that while there has been an appropriate refocusing of insolvency laws in many countries towards increasing the options for that early action to be taken, there has been little corresponding attention paid to creating appropriate incentives for directors to use those options.[2] The first section encourages the development of appropriate incentives by identifying for incorporation in the law relating to insolvency the basic obligations a director of an enterprise may have in the period approaching insolvency and the steps that might be taken to discharge those obligations. Those obligations would become enforceable only once insolvency proceedings commenced.

5. In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be clearly or widely addressed by national legislation. While the concept of enterprise groups has been considered and developed

[1] Ibid., paras. 8-10.
[2] Legislative Guide, part four, para. 6.

in many jurisdictions, the question of the obligations of directors in such situations remains somewhat confused.[3]

6. Part three of the Legislative Guide, which addresses the insolvency treatment of enterprise groups, notes that enterprise groups are often characterized by varying degrees of economic integration (from highly centralized to relatively independent) and types of organizational structure (vertical or horizontal) that create complex relationships between group members and may involve different levels of ownership and control. These factors, together with adherence to the single entity principle and the widespread lack of any explicit acknowledgement of the group reality in the legislation applicable to individual group members, raise a number of issues for directors of enterprise group members. Adherence to the single entity principle typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group, irrespective of the interests of the group as a whole, the position of the director's company in the group structure, the degree of independence or integration among group members and the incidence of ownership and control. But where that company's business is part of an enterprise group and reliant, at least to some extent, on other group members for the provision of vital functions (e.g. for financing, accounting, legal services, suppliers, markets, management direction and decision-making or intellectual property), addressing the financial difficulties of that company in isolation is likely to be difficult, if not, in some cases, impossible. Part three discusses in some detail the current economic reality of enterprise groups and, in the context of insolvency, the impact of treating enterprise group members as unrelated entities on resolving the financial difficulties of some group members or of the group more widely.[4]

7. The requirement to act in the interests of the directed company may be further complicated in the group context when a director of one group member performs that function or holds a managerial or executive position in other group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those group members and treat them in isolation: the interests of those group members may need to be balanced against each other, against the possibly competing economic goals or needs of other group members and against those of the enterprise group collectively. Moreover, achieving that balance may require assessment of both short and long term implications for the interests of the different group members and may even require the acceptance of some detriment, even if only in the short term, to the interests of individual group members in order to achieve a longer term benefit.

8. Some examples of situations in which a director might need to balance the interests of individual group members and those of the group more widely may include where one group member provides finance to another group member or acts as a guarantor for finance provided by an external lender to another group member, in an attempt to keep the group as a whole afloat, including its own business; where one group member agrees to transfer its business or assets or surrender a business opportunity to another group member or to contract with that member on terms that could not be considered commercially viable, but where to do so may ultimately benefit the business of group member agreeing to the transfer; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations.

9. Such considerations might be relevant in the period approaching insolvency, when greater control and coordination of the groups' activities may be required to maximize efficiency and design solutions to resolve the financial difficulties of the group as a whole or for some of its parts. At that time, there may also be more opportunities for advantage to be taken of more vulnerable and dependent group members in order to benefit other members, such as through transfers of assets,

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[3] A/CN.9/WG.V/WP.115, para. 40. This paper outlines the manner in which a number of different jurisdictions address this issue.

[4] Legislative Guide, part three, chap. I.

diversion of business opportunities and use of those group members to conduct more risky transactions or activities or to absorb losses and bad assets.

10. To address the best interests of the directed group member, a director may require a degree of flexibility to weigh the various competing interests and act for the benefit of other group members or the group as a whole where that action coincides with the best interests of the directed member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and instrumental in avoiding insolvency or minimizing its impact on the directed group member they should not be liable for breach of their obligations.

11. While, as noted above, few laws address directors' obligations in the enterprise group context, courts in different jurisdictions have accorded differing degrees of recognition to the practical reality of the manner in which enterprise groups operate. While the focus is still upon directors exercising their powers for the benefit of their own group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that group member from pursuing a particular course of action with other group members and to the extent to which their group member's prosperity or continued existence depends on the well-being of the group as a whole. Typically, however, collective benefit is not a sufficient justification by itself. Moreover, directors might also be required to take into account any reasonably foreseeable detriments that might flow to their group member as a result of the course of action taken and to consider the position of their group member's unsecured creditors, particularly where that member's solvency might be affected. The latter consideration is of particular importance where the transaction is a guarantee or security for a loan to another group member.

12. Other jurisdictions have allowed directors of group companies to act in the interests of the overall group when certain conditions are met, such as that the group has a balanced and firmly established structure; that the group member took part in the long-term and coherent group policy; and that the directors in good faith reasonably assumed that any detriment suffered by their group member would in due course be made good by other advantages. Another approach permits a director of a group member to act in the interests of the parent provided it does not prejudice the group member's ability to pay its own creditors and the directors are authorized, either by the constitution of the group member or by shareholders, depending on whether the group member is wholly or partly owned. Under those laws, the group member should not be insolvent at the time the director acts, nor should it become insolvent by virtue of that action.

13. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the group member they direct in fulfilling their obligations in the period approaching insolvency and the safeguards that should apply. Those considerations will, to a greater or lesser extent, reflect aspects of the economic reality of the enterprise group. This section proposes principles for inclusion in the law concerning the obligations of directors of enterprise group companies in the period approaching insolvency. These principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. Whilst recognizing the desirability of achieving the goals of insolvency law (outlined in part one, chapter I, paragraphs 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls for entrepreneurs that may result from overly draconian rules.

14. This section does not deal with the obligations of directors that may apply under criminal law, company law or tort law. It focusses only on those obligations that may be included in the law relating to insolvency and become enforceable once insolvency proceedings commence.

II. Elements of the obligations of directors of enterprise group companies in the period approaching insolvency

A. The nature of the obligations

15. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section of part four, paragraphs 1 to 7, and remains equally applicable in the enterprise group context. The obligations of directors of a group member continue to be the same basic obligations as established in recommendation 255, but provision might be made to permit the broader context of the economic reality of the enterprise group to be taken into account in determining the steps that should be taken by a director to avoid liability for breach of those obligations. Relevant factors to be considered might include the position of the enterprise group member in the enterprise group, the degree of integration between enterprise group members (as mentioned in recommendation 217 of part three) and the possibility of maximizing value in the group by designing a solution to the group's financial difficulties that includes the whole group or some of its parts. Such solutions may require a director of a group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that group member, but that will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value. Taking those same steps in circumstances where they are not likely to benefit the group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

16. One consideration for directors evaluating the steps to be taken to address the group member's financial difficulties is the impact of those steps on creditors of that group member, especially when wider group interests are to be accommodated. Recommendation 255 requires directors to have due regard to the interests of creditors, as well as of other stakeholders. The interests of creditors of the group member may be safeguarded by establishing a "no worse off" standard — i.e. that creditors will be no worse off under the steps that are taken than they would have been had those steps not been taken.

17. The first section of this part discusses the types of steps that a director might reasonably be expected to take in order to address financial difficulty, avoid the onset of insolvency and, where it is unavoidable, to minimize its impact (part four, chap. II, para. 5). Those steps would continue to be relevant in the group context and might be supplemented by additional steps, depending on the factual situation, that will effectively require some degree of mutual assistance and cooperation with other group members. Those additional steps might be affected by the position of the group member in the enterprise group and require consideration of whether more value might be preserved or created by assisting the implementation of a solution for the enterprise group as a whole or some of its parts, than by taking steps that relate only to the individual group member. Consideration might be given to assessing the directed member's obligations, both financial and legal, to other group members; the transactions that should (or should not) be entered into with other group members; possible sources and availability of post-commencement finance, including its provision by the directed group member to other group members; and the impact of possible solutions, whether limited to the directed group member or involving the group more widely, on creditors and other stakeholders of the directed group member. A director might also consider taking steps to organize informal negotiations with creditors, such as voluntary restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member.

18. Where insolvency is unavoidable and formal proceedings are to be commenced, a director might consider the court in which those proceedings should commence,

particularly when there is a possibility of making a joint application with other group members and procedurally coordinating those proceedings, as discussed in part three.[5]

Recommendations 267-268

Purpose of legislative provisions

The purpose of these provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders of the enterprise group member;

(b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;

(c) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that group member, including in situations where they are also responsible for making decisions concerning the management of other group members; and

(d) To permit an enterprise group member to be managed, where appropriate, in a manner that will maximize value in the enterprise group by promoting approaches to resolve insolvency for the enterprise group as a whole or for some of its parts, whilst ensuring that the creditors of that group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such approaches to resolution.

Paragraphs (a)-(d) should be implemented in a way that does not:

(a) Unnecessarily adversely affect successful business reorganization of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole or some of its parts, the position of the group member in the enterprise group and the degree of integration between group members;

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or

(c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations[6]

Variant 1

267. (255) The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligation(s) to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and insofar as not inconsistent with that obligation, they may take steps to promote an insolvency solution for the enterprise group as a whole or some of its parts. In order to do so, reasonable steps may include those directed to:

(a) Avoiding insolvency of their group member; and

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[5] Legislative Guide, part three, recs. 202-210.

[6] **Note to the Working Group**
Variant 1 parallels recommendation 255 of part four, with some additional wording referring to the group context and additional considerations in subparagraph (b) specifically addressing the group context, as agreed by the Working Group at its forty-sixth session (A/CN.9/829,

(b) Where insolvency of that group member is unavoidable, minimizing its impact on the creditors and other stakeholders of that group member, taking into account the possible benefit of maximizing the value of the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

Variant 2

267. (255)(a) The law relating to insolvency should specify that the obligations established in recommendation 255 will apply to a director of a company that is a member of an enterprise group.

(b) Insofar as not inconsistent with those obligations, the director of an enterprise group member may take reasonable steps to promote a solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the director may take into account the possible benefits of maximizing the value of the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members, whilst ensuring that the creditors of the group member and its other stakeholders are no worse off than if steps had not been taken to promote such a solution.

Reasonable steps for the purposes of recommendation 267[7]

268. (256)For the purposes of recommendation[s] 255 and 267, and to the extent [possible] [not inconsistent with the obligations of the director to the group member of which they are director] reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

1. (a) Evaluating the current financial situation of the enterprise group member and of the enterprise group to consider whether more value might be preserved or created by considering a solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the group member to other enterprise group members, whether transactions should be entered into with other enterprise group members, and possible sources and availability of post-commencement finance;

(c) Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under an insolvency solution for the enterprise group as a whole or some of its parts;

(d) Assisting the implementation of an insolvency solution for the group as a whole or some of its parts; and

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[8] where organized for the enterprise group as a whole or some of its parts.

2. Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application[9] with other

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paras. 16-19).

Variant 2 has been prepared by the Secretariat to emphasize the primary importance of a director's obligations to the companies of which he or she is a director. Accordingly, Variant 2 specifies, in paragraph (a), that recommendation 255 is the starting point for the obligations of a director in the group context. Paragraph (b), which introduces the group context, incorporates wording from the chapeau and paragraph (b) of Variant 1 that extends the considerations to be taken into account in satisfying the obligations in recommendation 255 to include aspects specific to the group context and to give effect to several suggestions made at the forty-sixth session (e.g. A/CN.9/829, para. 18).

[7] **Note to the Working Group**: Draft recommendation 268 has been revised as agreed by the Working Group at its forty-sixth session (A/CN.9/829, paras. 21-24).

[8] Legislative Guide, part one, paras. 2-18.

[9] Ibid., part three, recs. 199-201.

relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[10]

B. Identifying the parties who owe the obligations

19. In the group context, identifying those responsible for management decisions may be more complex than in the case of a single company. Various layers of management and influence can affect the affairs of any single group member and the manner in which it conducts its business, particularly in the vicinity of insolvency. Such influence may undermine the ability of the directors of a group member to take appropriate steps to address the financial difficulties of the directed member or involve that member in the financial difficulties of other group members, to the detriment of the creditors of the directed group member. This may occur in numerous circumstances, such as where the boards of the two members consist of substantially the same persons; where the majority of the board of one group member is nominated by the other member, which is in a position of control; where one group member controls the management and financial decision-making of the group; and where one group member interferes in a sustained and pervasive manner in the management of another group member, typically in the situation of a parent and controlled group member.

20. There may also be some groups in which it is difficult to identify the precise boundaries between group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by group members several steps removed from the group member in question and the separate identity and liability of that group member may be generally disregarded in the daily business of the group. In such situations, serious issues may arise as to the obligations of such persons with respect both to the actual business conducted by the group member in question and to the group member by which they are employed.

21. Persons that might be considered to be a director in the group context could include another group member or the director of another group member, including a shadow director[11] of that other group member. While some laws do not permit a group member to be formally appointed as a director of another group member, such a group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs the activities of that group member.

22. Paragraphs 13 to 16 of the first section of this part discuss the parties who owe the obligations discussed above. Recommendation 258 adopts a broad formulation, providing that it should include any person formally appointed as a director and other person exercising factual control and performing the functions of a director. Paragraph 15 of the commentary notes the types of function that may be expected to be performed by such a person.

C. Conflicting obligations

23. It may often be the case in enterprise groups that a director performs that function or holds a management or executive position in more than one group member, whether as a result of the ownership and control structure of the group, the alliances between group members, family ties across the group or some other aspect of the manner in which the business or businesses of the group are organized.[12] Whatever the reason, a director who sits on the boards of a number of different group members may face, in the period approaching insolvency, potential conflicts between the obligations owed to those different group members as they attempt to identify the course of action most likely to preserve value and provide the best solution to the

[10] Ibid., part three, recs. 202-210.

[11] Ibid., part four, footnote 11 to para. 13.

[12] See Legislative Guide, part three, paras. 6-15.

financial difficulties of each group member. The nature and complexity of the conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled group members, for example, they may need to be able to demonstrate that any transaction involving the parent took into account and was fair and reasonable to the controlled group member.

24. In addition, the interests of the directed group members may be closely intertwined with the group more widely, requiring the economic reality of the group as a whole to be considered. In such circumstances, steps that may be regarded as detrimental to company operating as a stand-alone entity may be reasonable when considered in that broader context. The business of a subsidiary, for example, may be generally dependent on the business of the group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

25. Directors facing such a conflict might be expected to act reasonably and take adequate and appropriate steps to address the situation. That might require a director, depending on the factual situation, to identify the precise nature of the conflict in accordance with applicable law and determine how it might be addressed. It may be sufficient in some circumstances for the director to disclose the conflict to the affected boards of directors, while in other circumstances wider disclosure to creditors and other stakeholders, including the boards of directors of other group members, may be desirable. Such disclosure may be sufficient to support the director's continuing integrity and any lack of the impartiality or independence required can be assessed against the circumstances disclosed.

26. It may be appropriate in some circumstances for the director to step back from participating in any decisions relating to the conflict that are to be taken by the affected boards or attending meetings at which related issues are to be discussed. Appointment of additional or substitute board member may be possible in some cases and, if the conflict cannot be resolved, the director may consider, as a last resort, resigning from one or other of the affected boards. This might potentially include resignation from the board of an insolvent or a solvent group member. While that option of resignation may free the director of the dilemma, it simultaneously neglects the larger problem and may exacerbate the situation, especially in the period approaching insolvency, if it leaves the affected group member or members without the expertise necessary to address their financial difficulties.

27. A good board process that analyses the situation of the respective group members giving rise to the conflict and records the reasons for the action taken may be helpful to the director in discharging obligations with respect to the conflict.

Recommendations 269-270

Purpose of legislative provisions

The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different group members, which may have an impact upon the steps to be taken to discharge those obligations.

Contents of legislative provisions

[Conflict of obligations] [Conflicting obligations]

269. (256 bis) The law relating to insolvency should address the situation where, in the period approaching insolvency, a director of an enterprise group member who holds that position or a management or executive position in another or in other

enterprise group members has a conflict between the obligations owed in relation to the creditors and other stakeholders of those different group members.

Reasonable steps for the purposes of recommendation 269

Variant 1[13]

270. (256 ter) The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts, including obtaining advice to establish the exact nature of the different obligations; disclosing to creditors, other directors of relevant members and other stakeholders situations likely to lead to conflicting obligations; not participating in any decision by the board of directors of the same group member on the matters giving rise to such conflicts; [seeking the appointment of] [appointing] an additional director when the conflicting obligations cannot be reconciled; and, as a last resort, resigning where there is no alternative course of action available and resignation will not exacerbate the situation.

Variant 2[14]

270. (256 ter) The insolvency law may specify that a director faced with conflicting obligations should take reasonable steps to manage those conflicts. Those steps may include obtaining professional advice to establish the exact nature of the conflicting obligations and how to manage them, and disclosing to other directors, creditors and other stakeholders the nature of the conflict and the situations in which the conflict is likely to arise. In determining whether conflicts are adequately managed, a director should consider whether the steps taken are sufficient so that the creditors and other stakeholders of the group members of which they are a director are in no worse a position than they would have been had the conflicts not arisen. As a last resort, the director may need to resign from any group member in relation to which the conflict is not adequately manageable.

Variant 3[15]

270. (256 ter) The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts. Reasonable steps may include:

(a) Obtaining advice to establish the exact nature of the different obligations;

(b) Identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information;

(c) Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts, or (ii) be present at any board meeting at which such issues are to be considered;

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[13] **Note to the Working Group**: **Variant 1** includes revisions agreed by the Working Group at its forty-sixth session (A/CN.9/829, paras. 27-29). Since the appointment of an additional director might not be within the powers of the conflicted director, different drafting is proposed for that action.

[14] **Note to the Working Group**: **Variant 2** was proposed at the forty-sixth session, but not considered for lack of time (A/CN.9/829, para. 30).

[15] **Note to the Working Group**: **Variant 3** is a drafting suggestion prepared by the Secretariat. It is based upon Variant 1, but seeks to specify the steps to be taken more broadly. Rather than listing, for example, the specific persons to whom the director should disclose a conflict of interest, it indicates the reasonable step to be identifying the parties to whom disclosure should be made and then disclosing relevant information. The commentary to the recommendation might indicate some of the parties to whom disclosure might be appropriate, including other members of the boards of affected group members or possibly board of directors of other group members. Paragraph (c) builds upon some text added at the forty-sixth session to include the possibility of a director absenting themselves from a meeting that is to consider issues to which the conflict relates. In paragraph (d), since the appointment of such an additional director might not be within the powers of the conflicted director, different drafting is proposed.

(d) [Seeking the appointment of] [Appointing] an additional director when the conflicting obligations cannot be reconciled; and

(e) As a last resort, where there is no alternative course of action available and resignation will not exacerbate the situation, resigning from the relevant board(s) of directors.

H. Note by the Secretariat on cross-border recognition and enforcement of insolvency-related judgements

(A/CN.9/WG.V/WP.130)

[Original: English]

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgements.

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgements, including the types of judgements that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),[1] but that the Model Law provided an appropriate context for the new instrument.

3. The draft text set forth below is drafted in the form of a model law to be given effect through enactment by a State and thus, when it refers to "this State", it means the enacting State. The content and structure of the draft text draws upon the Model Law, as suggested by the Working Group (A/CN.9/829, para. 63). References to the relevant Model Law sources of certain definitions and articles are indicated in the footnotes (e.g. draft articles 8 and 9 follow elements of articles 15, 16 and 17 of the Model Law).

4. The draft text seeks to give effect to the conclusions of the Working Group at its forty-sixth session, particularly with respect to the types of judgement to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

5. One issue not considered in the draft is the treatment of judgements arising in what might be considered competing insolvency proceedings (A/CN.9/829, para. 75). This issue might be relevant in the types of scenario outlined in working paper A/CN.9/WG.V/WP.128 concerning cross-border treatment of the insolvency of enterprise groups, which is also to be discussed at the Working Group's forty-seventh session.

[1] A/CN.9/829, paras. 60 and 74.

Draft model law on the recognition and enforcement of insolvency-related judgements

Preamble

The purpose of this Law is to provide for recognition and enforcement of insolvency-related judgements in cross-border insolvency cases in a predictable and transparent manner, in order to promote:

(a) Cooperation between the courts of this State and courts of other States involved in cross-border insolvency cases;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvency cases;

(d) Protection and maximization of the value of the debtor's assets and affairs, and distributions to creditors; and

(e) Simplification of the procedure and reduction in the cost and time required for recognition and enforcement of insolvency-related judgements.

Article 1. Scope of application

1. This Law applies where:

(a) Recognition and enforcement of an insolvency-related judgement is sought in this State by a foreign representative or other person entitled to seek enforcement of such a judgement in connection with a foreign proceeding; or

(b) Recognition and enforcement of an insolvency-related judgement is sought in a foreign State in connection with a proceeding under the law of this State.

2. This Law does not apply to […].

Article 2. Definitions

For the purposes of this Law:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in which the assets and affairs of a debtor are [or were] subject to control or supervision by the court for the purpose of reorganization or liquidation;[2]

(b) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in 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;[3]

(c) "Judgement" means any judicial or administrative decision, whatever it may be called, including a decree or order, and a determination of costs and expenses provided that the determination related to a judicial or administrative decision,[4] and any decision ordering provisional or protective measures;[5]

(d) "Insolvency-related judgement" means a judgement that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgement is presumed to be "closely related to a foreign proceeding" if it has an effect upon the insolvency estate of the debtor and either: (i) is based on a law relating to insolvency; or (ii) due to the nature and legal basis of its underlying claims, would

[2] This definition is based on the Model Law, art. 2, subpara. (a).

[3] Ibid., art. 2, subpara. (d).

[4] This definition is taken from the Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), art. 4.

[5] This last phrase relating to provisional measures is taken from the draft global judgements convention prepared by The Hague Conference on Private International Law, 2001 version, art. 23.

not have been issued without the commencement of the foreign proceeding.[6] An insolvency-related judgement would include any equitable relief, including the establishment of a constructive trust, provided in that judgement or required for its enforcement. Insolvency-related judgements may include judgements concerning any of the following matters:

(i) Turnover of property of the insolvency estate;

(ii) Sums due to the insolvency estate;

(iii) Sale of assets by the insolvency estate;

(iv) Requirements for accounting related to the insolvency proceeding;

(v) *Variant 1*

Overturn of transactions involving the debtor or assets of the insolvency estate that have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;[7]

(v) *Variant 2*

Resolution of actions to avoid or otherwise render acts detrimental to creditors ineffective,[8] including undervalued transactions, preferential transactions and transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;[9]

(vi) Modification or enforcement of a stay of actions in a foreign proceeding;[10]

(vii) Validity of a secured claim;

(viii) A cause of action pursued by a creditor with approval of the court, based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action;

(ix) Liability of a director in the period approaching insolvency;[11]

(x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement];

(xi) Whether a particular debt can be discharged; and

(xii) Recognition of the discharge of a debtor.

Article 3. International obligations of this State[12]

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

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[6] The draft article might indicate that for the purposes of this model law, an insolvency-related judgement would not include a judgement imposing a criminal penalty.

[7] The wording of this variant is based on the UNCITRAL Legislative Guide on Insolvency Law, rec. 87.

[8] The wording of this variant is based on the UNCITRAL Model Law on Cross-Border Insolvency, art. 23.

[9] This wording is taken from the Legislative Guide, rec. 87.

[10] Some consideration might be given to the issue of possible overlap with provisions of the Model Law, such as art. 22, para. 3.

[11] See Legislative Guide, part four dealing with the obligations of directors of a company in the period approaching insolvency, recs. 255, 259 and 260.

[12] This draft article repeats art. 3 of the Model Law.

Article 4. Competent court or authority[13]

The functions referred to in this Law relating to recognition and enforcement of insolvency-related judgements shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State[14]

A party entitled to enforce an insolvency-related judgement given under the law of this State is authorized to act in a foreign State to seek enforcement of that judgement, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws[15]

Nothing in this Law limits the power of a court or a [*insert the title of any other person or body administering the recognition and enforcement of an insolvency-related judgement under the law of the enacting State*] to provide to a party seeking recognition and enforcement of an insolvency-related judgement in this State additional assistance or relief under other laws of this State, in particular those laws relating to decisions concerning the commencement, conduct, administration and conclusion of insolvency proceedings.

Article 7. Interpretation[16]

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

Article 8. Recognition and enforcement of an insolvency-related judgement[17]

1. A foreign representative or other person entitled under the law of the State in which the judgement was issued to seek enforcement of an insolvency-related judgement may request the court in this State to recognize and enforce that judgement.[18]

2. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:

(a) A copy of the insolvency-related judgement;

(b) A certified statement of whether the insolvency-related judgement is a final judgement or, if not, the identification of the appellate court where any appeal is pending, and the status of the appeal;

(c) Evidence that the party against whom relief is sought received notice of the proceeding in which the insolvency-related judgement was issued and had an opportunity to be heard prior to the issue of the judgement; and

(d) Evidence that the party against whom relief is sought was provided notice of the request in this State for recognition and enforcement of the insolvency-related judgement.

3. The court may require translation of documents supplied in support of recognition of the insolvency-related judgement into an official language of this State.

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[13] Ibid., art. 4, with revisions specific to insolvency-related judgements.
[14] Ibid., art. 5.
[15] Ibid., art. 7.
[16] Ibid., art. 8.
[17] This draft article is based on art. 15 of the Model Law, paras. 1, 2 and 4. Draft para. 4 of this article is based on art. 16, para. 2, of the Model Law.
[18] An insolvency-related judgement may also be raised as a defence to an action concerning the same matter/claim in the enacting or another State.

4. The court is entitled to presume that documents submitted in support of a request for recognition of the insolvency-related judgement are authentic, whether or not they have been legalized.

Article 9. Decision to recognize and enforce an insolvency-related judgement[19]

An insolvency-related judgement shall be recognized and may, upon recognition, be enforced without review of the merits of the judgement provided:

(a) The insolvency-related judgement is within the meaning of article 2, subparagraph (c);

(b) The person seeking enforcement of the insolvency-related judgement is a person within the meaning of article 2, subparagraph (b), or another person entitled to seek enforcement of the judgement under article 8, paragraph 1;

(c) The requirements of article 8, paragraph 2, are met;

(d) The court from which recognition is sought is the court referred to in article 4; and

(e) Article 10 does not apply.

Article 10. Grounds to refuse recognition of an insolvency-related judgement[20]

The court may decline to recognize an insolvency-related judgement if the party against whom relief is sought demonstrates that:

(a) The insolvency-related judgement is subject to review in the originating State or the time limit for seeking review has not expired and the originating State would not enforce the insolvency-related judgement because of the availability of such review;

(b) The party against whom the proceeding giving rise to the insolvency-related judgement was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(c) The insolvency-related judgement was obtained by fraud in connection with a matter of procedure;

(d) Recognition and enforcement of the insolvency-related judgement would be manifestly contrary to the public policy of this State;

(e) The proceeding in which the insolvency-related judgement was issued was manifestly contrary to the fundamental principles of procedural fairness of this State;

(f) The insolvency-related judgement is inconsistent with a prior judgement given in this State in a dispute between the same parties;

(g) The insolvency-related judgement is inconsistent with an earlier judgement given in another State involving the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in this State;

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[19] This draft article is based on art. 17 of the Model Law.

[20] These grounds are based upon those discussed and agreed upon at the Working Group's forty-sixth session (A/CN.9/829, paras. 68-71).

(h) Recognition and enforcement of the insolvency-related judgement would interfere with the administration of the debtor's insolvency proceedings[21] or would be inconsistent with a stay or other order entered in insolvency proceedings in this or another State;

(i) *Variant 1*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on a basis that was unreasonable or unfair. A basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State.

(i) *Variant 2*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on one of the following grounds:

(i) The presence of that party's property in the jurisdiction of the foreign court, when the property is unrelated to the insolvency-related judgement;

(ii) The nationality of a different party; or

(iii) Any other basis that was unreasonable or unfair; a basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State.

Article 11. Severability[22]

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognized or enforced under this Law.

Article 12. Provisional relief[23]

1. From the time recognition and enforcement of an insolvency-related judgement is sought until a decision is made, the court may grant relief of a provisional nature where relief is urgently needed, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgement has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgement.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice*.]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgement is made.

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[21] At the forty-sixth session, it was suggested that this ground might be included as an alternative to restricting recognition to judgements emanating from proceedings that might be regarded as main or non-main proceedings (A/CN.9/829, para. 70).

[22] At its forty-sixth session, the Working Group noted that it might be advisable to provide for severability so as to enable enforcement of only a part of a judgement in cases where grounds for refusal of other parts might exist; certain elements such as a punitive damages award might thus be excluded (A/CN.9/829, para. 61). This draft article is based on article 15 of the 2005 Hague Convention (see note 4).

[23] This draft article is based upon paras. 1, 2 and 3 of art. 19 of the Model Law; para. 4 of article 19 is included among the grounds for refusal of recognition under draft art. 10, subpara. (h).

I. Note by the Secretariat on France's observations on document A/CN.9/WG.V/WP.128 entitled “Facilitating the cross-border insolvency of multinational enterprise groups”

(A/CN.9/WG.V/WP.131)

[Original: English]

Note by the Secretariat

The Government of France has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following observations in order to provide the Working Group with additional information for its deliberations. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

Annex

France's observations on document A/CN.9/WG.V/WP.128 entitled "Facilitating the cross-border insolvency of multinational enterprise groups"

1. The document for consideration by the Working Group at the next session of Working Group V on cross-border insolvency of multinational enterprise groups is divided into two parts.

Part I deals with provisions for possible inclusion in domestic insolvency law.

2. The general introduction to the document explains that Part I focuses on a coordinated insolvency solution developed for the group as a whole or for some of its parts. However, subsequent developments, in particular in section I.B. (points 14 to 18), refer to the centre of main interests of the "group insolvency solution" which would serve to limit the commencement of proceedings affecting different group members. The coordinated insolvency solution referred to in the general introduction to the document appears therefore to involve the determination of a court having jurisdiction by virtue of the centre of main interests of the "group insolvency solution".

3. Sanctioning such an interpretation of the notion of centre of main interests entails, inter alia, risks of unpredictability and "forum shopping". In addition, it appears to be contrary to the consensus that had emerged during previous sessions of Working Group V and which is recalled, inter alia, in paragraph 12 of working paper A/CN.9/WG.V/WP.120 entitled "Facilitating the cross-border insolvency of multinational enterprise groups" discussed at the 45th session (New York, 21-25 April 2014).

Part II contains draft legal provisions for the purpose of developing a regime for international recognition.

4. Taking into account the serious reservations expressed at the 46th session, including reservations relating to point 16 of document A/CN.9/WG.V/WP.124, the preamble no longer mentions, among the objectives, either facilitating participation of several members of an enterprise group in a single proceedings, or limiting the number of insolvency proceedings affecting members of a group.

5. Among the current objectives, (c) mentions coordination of and cooperation between insolvency proceedings affecting members of an enterprise group, and (d) participation of any member, whether solvent or insolvent. However, despite those objectives, which France supports, paragraph (i) of article 2 on definitions concerns the term "enterprise group insolvency solution" and provides that this solution would be implemented in a proceeding in a State that is the centre of main interests of at least one enterprise group member.

6. As a result, France considers that there is a contradiction between the objectives set forth in the preamble and the drafting proposals in the remainder of the paper. In addition, article 5.1. in section II.B. provides for cases in which a foreign group proceeding is automatically recognized, which compounds the contradiction.

7. Accordingly,

France would like to draw the attention of the Working Group to the need to match objectives and drafting proposals. As matters stand, the drafting proposals present risks and may lead to abuses, encouraging "forum shopping" and allowing an enterprise group member that is the first to commence group proceedings to ensure that its own interests prevail over those of other enterprises belonging to the same group. The drafting proposals are also problematic regarding the independence of the courts, an independence which is based on clear and foreseeable rules on jurisdiction.

In accordance with the objectives set forth in the general introduction of document concerning Part I and in the preamble to Part II, France believes that

the focus should be placed solely on facilitating cross-border insolvency proceedings affecting multinational enterprise groups by way of procedural coordination and cooperation between courts and insolvency representatives.

VI. SECURITY INTERESTS

A. Report of Working Group VI (Security Interests) on the work of its twenty-sixth session (Vienna, 8-12 December 2014)

(A/CN.9/830)

[Original: English]

Contents

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the "draft Model Law"), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).[1] At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide"), the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the Registry Guide.[2]

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group had a general exchange of views on the basis of a note prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.55 and Add.1 to 4).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

[2] Ibid.

modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.[3] After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012 (see para. 1 above).[4] The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[5]

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11). At its twenty-fifth session (New York, 31 March-4 April 2014), the Working Group continued its work based on a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57/Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/802, para. 11). At that session, the Working Group also decided to recommend to the Commission that the draft Model Law address security rights in non-intermediated securities along the lines agreed upon by the Working Group at that session (see A/CN.9/802, para. 93).

5. At its forty-seventh session (New York, 7-18 July 2014), the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities (see A/CN.9/811), and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.[6]

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its twenty-sixth session in Vienna from 8 to 12 December 2014. The session was attended by representatives of the following States members of the Working Group: Armenia, Austria, Canada, China, Colombia, Croatia, France, Germany, Indonesia, Israel, Italy, Japan, Malaysia, Mexico, Nigeria, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Island, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Bolivia (Plurinational State of), Burkina Faso, Chile, Congo, Cyprus, Czech Republic, Dominican Republic, Libya, Peru, Qatar and Romania. The session was also attended by an observer from the European Union.

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

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

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Asociación Interamericana de Derecho Internacional Privado (ASADIP), Commercial Finance Association (CFA), European Federation for Factoring and Commercial Finance (EUF), European Law Students' Association (ELSA), Factors Chain International (FCI), Forum for International

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 193.
[4] Ibid., para. 194.
[5] Ibid., para. 332.
[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

Conciliation and Arbitration (FICACIC), International Factors Group (IFG), International Insolvency Institute (III), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA) and National Law Centre for Inter-American Free Trade (NLCIFT).

9. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Fazlina PAWAN TEH (Malaysia)

10. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.60 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.61 and Add.1-3 (Draft Model Law on Secured Transactions).

11. 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. Draft Model Law on Secured Transactions.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add.1-3). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law to reflect the deliberations and decisions of the Working Group.

IV. Draft Model Law on Secured Transactions

A. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.61)

Article 1. Scope of application

13. With respect to paragraph 1, the Working Group agreed that, to avoid repeating the essence of the definition of the term "security right", which was contained in article 2, subparagraph (ii), it should be revised to refer to security rights in movable assets as defined in article 2, subparagraph (ii). It was also agreed that the term "movable asset" could be elaborated in the Guide to Enactment.

14. The Working Group next proceeded to consider the definition of the term "security right". A number of drafting suggestions were made. One suggestion was that, to better reflect the functional approach of the draft Model Law ("substance over form"), the definition should be revised to read along the following lines "… an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right or not, the type of asset, the status of the grantor or the secured creditor, or the nature of the secured obligation". While there was support for that suggestion, it was also suggested that, for reasons of consistency, a noun should be used to refer to the "denomination of the right as a security right". That suggestion was objected to on the ground that the term "denomination" might be misleading. Another suggestion was that, to avoid inadvertently excluding security rights that might not be considered as falling under the category of property rights in some jurisdictions, the reference to a security right as a property right should be deleted. That suggestion was also objected to on the

ground that the reference to a security right as a property right (i.e. a right in rem) was necessary to exclude personal security rights (i.e. a right ad personam such as a guarantee). In that connection, it was suggested that the reference in article 11, paragraphs 1 and 2, to personal or property rights securing payment or other performance of a receivable should be clarified. Yet another suggestion was that the words "for convenience of reference" should be deleted as it was sufficiently clear that the term "security right" included the right of the transferee in an outright transfer of a receivable for convenience of reference and thus those words were inappropriate in a model law. There was sufficient support for that suggestion.

15. With respect to paragraph 2, the suggestion was made that, to avoid repeating that the draft Model Law applied to outright transfers of receivables, it should be recast to refer to the fact that articles 81-94 of the draft Model Law did not apply to such transfers. While there was agreement as to the thrust of that suggestion, it was agreed that, in its current formulation, paragraph 2 emphasized an important and novel point that was worth repeating and thus paragraph 2 should be retained unchanged.

16. With respect to subparagraph 3(a), a number of suggestions were made. One suggestion was that it should include a reference to article 11, paragraph 2, which provided for the extension of a security right in a receivable to a right to receive the proceeds under an independent undertaking that secured the payment or other performance of the receivable. Another suggestion was that the right to receive the proceeds under an independent undertaking should not be excluded from the scope of the draft Model Law. In that connection, it was noted, however, that, if a right to receive the proceeds under an independent undertaking was to be covered, the relevant asset-specific recommendations of the Secured Transactions Guide should be reflected in draft Model Law. Yet another suggestion was that article 11, paragraph 2, should be deleted. In that connection, it was noted that article 11, paragraph 2, was based on recommendation 25, subparagraph (b), of the Secured Transactions Guide, which in turn was based on article 10, paragraph 1, second sentence, of the Assignment Convention dealing with personal or property rights securing an assigned receivable (although the latter was somehow different). After discussion, the Working Group decided to postpone its consideration of paragraph 3(a) until it had an opportunity to consider article 11 (see paras. 60-62 below).

17. With respect to subparagraph 3(b), it was noted that it referred to types of high-value mobile equipment covered in international conventions and those covered in domestic specialized secured transactions and registration regimes. The Working Group agreed that deference to international conventions should be addressed in a separate provision dealing with the international obligations of the enacting State (along the lines of article 3 of the UNCITRAL Model Law on Cross-Border Insolvency or, to avoid a blanket exclusion, article 38 of the Assignment Convention). As to domestic specialized regimes, it was agreed that the Guide to Enactment should explain that the enacting State could preserve any such regime by setting it out in subparagraph 3(h).

18. With respect to subparagraph 3(c), the Working Group agreed that it should be retained with the footnote stating that it might not be necessary if the enacting State had coordinated, or otherwise addressed the hierarchy between, its secured transactions law and its intellectual property law.

19. With respect to subparagraph 3(d), it was stated that the draft Model Law should not exclude intermediated securities that were the core assets in financial markets. The Working Group noted that the matter could be referred to the Commission, with or without a recommendation by the Working Group, depending on whether the Working Group would have the time to consider it and reach consensus on it. The Working Group also noted that the matter required coordination with the International Institute for the Unification of Private Law ("Unidroit") in view of its work with respect to capital markets.

20. With respect to subparagraph 3(e), it was suggested that, to avoid inadvertently excluding even transactions relating to set off between two sellers of goods with respect to trade claims and counterclaims, the reference to "netting agreements"

should be qualified by a reference to "a close-out netting agreement". The Working Group agreed that the words "a close-out netting agreement" should be included within square brackets and the definitions of the terms "financial contract" and "netting agreement", contained in the Secured Transactions Guide, should be included in article 2 of the draft Model Law within square brackets.

21. With respect to subparagraph 3(f), the Working Group agreed to postpone its consideration until it had the opportunity to consider subparagraph 3(e) and the definitions of the terms "financial contract" and "netting agreement at a future session.

22. With respect to subparagraph 3(g), the Working Group agreed that it should be revised to clarify that the draft Model Law did not apply to proceeds of assets that were outside the scope of the draft Model Law but only to the extent that other law applied and governed the matters addressed in the draft Model Law.

23. With respect to subparagraph 3(h), the Working Group agreed that it should be retained with the footnote stating that any other exceptions should be limited and set out in the draft Model Law in a clear and specific way, and with a reference in the Guide to Enactment to specialized secured transactions and registration systems (see para. 17 above).

24. With respect to paragraph 4, it was agreed that it should be deleted as it was inconsistent with recommendation 2, subparagraph (b), of the Secured Transactions Guide, it was unnecessary as it envisaged transactions involving individual secured creditors that were extremely difficult to envisage, and the relevant issues were sufficiently addressed in paragraph 5.

25. With respect to paragraph 5, the Working Group agreed that it should be broadened to cover procedural protection afforded to consumers (relating, for example, to the form of a contract or notices to be given) and consumer parties other than "an individual grantor or a debtor of an encumbered receivable".

26. With respect to paragraph 6, the Working Group agreed that it should be deleted as the meaning of the term a "small enterprise" or "micro-business" varied from State to State and attempting to provide such businesses protection similar to that afforded to consumers might inadvertently result in depriving them of the benefits of the draft Model Law and in particular of increased access to secured credit. In that connection, it was pointed out that each State could determine whether additional rules would need to be introduced to deal with microfinancing.

27. With respect to paragraph 7, the Working Group agreed that the reference to "contractual" limitations should be deleted, as recommendation 18 of the Secured Transactions Guide, on which paragraph 7 was based, referred only to "provisions of other law". It was noted, however, that, although it was inconsistent with recommendation 18, paragraph 7 was accurate in the sense that the draft Model Law did not expressly deal with negative pledge agreements with respect to any asset other than receivables addressed in articles 23-25. The Working Group agreed to consider that matter at a later stage (see para. 68 below).

28. After discussion, the Working Group adopted the substance of article 1 subject to the above-mentioned changes (see paras. 13-27 above).

Article 2. Definitions

29. The Working Group agreed that the definitions contained in article 2 should be considered in the context of the articles in which they were used.

Article 3. Party autonomy

30. The Working Group adopted the substance of article 3 unchanged.

Article 4. General standard of conduct

31. With respect to article 4, a number of suggestions were made. One suggestion was that the word "commercially" qualifying the words "reasonable manner" in

paragraph 1 should be deleted or revised as, in many jurisdictions, the concept of "commercial reasonableness" was not known and its use might inadvertently result in uncertainty and increased litigation. While some support was expressed, that suggestion was objected to. It was stated that the concept of "commercial reasonableness" referred to the commercial context and to best business practices, and was universally known and thus referred to in the Secured Transactions Guide (see recommendation 131). It was widely felt, however, that the Guide to Enactment could usefully elaborate on that concept. Another suggestion was that compliance with a provision of the draft Model Law setting out a specific standard of conduct (for example, article 90, paragraph 3) should be sufficient for the parties to be considered as having acted in commercially reasonable manner. It was agreed that that matter too could be discussed in the Guide to Enactment.

32. Yet another suggestion was that the word "general" qualifying the words "standard of conduct" in paragraph 2 should be deleted, as it suggested that the draft Model Law contained one or more specific standards of conduct. That suggestion was objected to on the ground that the standard of conduct foreseen in paragraph 2 was "general" in the sense that it applied throughout the draft Model Law, while the draft Model Law included provisions providing specific standards of conduct. Yet another suggestion was that either paragraph 2 or the first part of article 3, paragraph 1 ("except as otherwise provided in article [4, …]") should be deleted as they dealt with the same issue. That suggestion was objected to. It was stated that article 3, paragraph 1, dealt with exceptions to the principle of party autonomy, while article 4, paragraph 2, dealt with the question whether the general standard of conduct could be waived unilaterally or varied by agreement.

33. After discussion, the Working Group adopted the substance of article 4 unchanged.

B. Definitions and articles relating to security rights in non-intermediated securities (A/CN.9/WG.VI/WP.61 and Add.1-3)

34. The Working Group next proceeded to consider the definitions and articles pertaining to the treatment of non-intermediated securities in the draft Model Law.

Article 2. Definitions relating to security rights in non-intermediated securities

35. With respect to the definition of the term "securities", it was agreed that subparagraph (i) should be revised to read along the following lines: "an obligation of an issuer, or any share or similar right of participation in an issuer or the enterprise of an issuer".

36. With respect to the definition of the term "intermediated securities", it was noted that, while it appropriately tracked the definition of that term contained in the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Geneva Securities Convention"), it might need to be aligned more closely with domestic securities law. It was also suggested that it might be necessary to also include in article 2 a definition of the term "securities account".

37. With respect to the definition of the term "non-intermediated securities", the concern was expressed that it was tautological. The concern was also expressed that it could be read to suggest that, if an intermediary directly held securities (not through another intermediary), those directly-held securities were "intermediated securities". In that connection, it was stated that, although, with respect to the intermediary, those securities should be treated as non-intermediated securities and the intermediary's rights should be determined under the laws that applied to non-intermediated securities. It was agreed that that matter could be usefully discussed in the Guide to Enactment.

38. With respect to the definition of the term "certificated non-intermediated securities", it was agreed that alternative A should be deleted and alternative B should be retained, as, while the former was concise, the latter provided more guidance to

States. With respect to the bracketed words in subparagraph (ii) of alternative B, it was agreed that it should be revised to refer to the possibility of the holder of the certificate to register in the books of the issuer and thus acquire rights against the issuer, rather than as the only method for transferring the certificate. It was also agreed that the word "written" should be deleted, as a certificate should be understood as a tangible asset subject to physical possession. It was also agreed that the same change should be made to the definition of the term "uncertificated non-intermediated securities".

39. With respect to the definition of the term "control agreement", it was agreed that the Guide to Enactment should explain that the requirement for the control agreement to be "evidenced by a signed writing" should not be understood to require a single document as control agreements were often concluded with more than one document. As a matter of presentation, it was suggested that all the definitions relating to security rights in securities should be set out together in article 2.

40. In the discussion, with respect to the definition of the term "knowledge", it was agreed that it should be recast as a rule of interpretation or deleted and the draft Model Law should refer to actual knowledge. It was also agreed that throughout the draft Model Law reference should be made to "possession", rather than to "delivery" of a tangible asset.

Article 25. Third-party effectiveness of a security right in non-intermediated securities

41. The Working Group agreed that paragraph 1 should be deleted as subparagraphs 1(a) and (b) reiterated the general methods for achieving the third-party effectiveness and subparagraph 1(c) addressed an issue of interest only to parties to the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930; the "Geneva Bills and Notes Convention"). In that connection, it was agreed that the provision agreed upon by the Working Group with regard to the international obligations of the enacting State was sufficient to preserve the application of the Geneva Bills and Notes Convention (see para. 17 above). In addition, it was agreed that the Guide to Enactment could discuss endorsement as a method of making a security right in non-intermediated securities effective under the Geneva Bills and Notes Convention and draw the attention of the States parties to that Convention to the need for them to coordinate their laws with the draft Model Law. In view of its decision with respect to article 25, subparagraphs 1(a) and (b), the Working Group decided that article 25, subparagraph 2(a), as well as article 23, subparagraph (a), and article 24, paragraph 1, should also be deleted for the same reasons, with a cross-reference to article 15 that reflected the general rule on third-party effectiveness of a security right. Subject to those changes, the Working Group adopted the substance of article 25.

Article 61. Priority of a security right in non-intermediated securities

42. The Working Group agreed that paragraph 1 should be deleted on the understanding that the Guide to Enactment would draw the attention of States parties to the Geneva Bills and Notes Convention to the need for them to deal with a conflict of priority between a security right made effective against all parties under the Convention and a security right made effective against third parties under the draft Model Law (see para. 41 above). It was also agreed that paragraph 5 should be placed right after paragraph 2 so that paragraphs 3-5 dealing with the priority of security rights in uncertificated securities would be set out in a more logical order. In addition, it was agreed that paragraphs 6 and 7 should be deleted as paragraph 6 and subparagraph 7(a) repeated the general rules and subparagraph 7(b) contained a substantive rule that should be left to the law relating to the transfer of securities. In that connection, the Working Group agreed that paragraphs 6 and 7 might need be reconsidered after the Working Group had an opportunity to discuss article 55 (priority of security rights in negotiable instruments). Moreover, noting that paragraph 8 appropriately preserved the application of the law relating to the transfer of securities, the Working Group agreed that it should be retained. It was also agreed

that option B should also be retained for further consideration by the Working Group. Subject to those changes, the Working Group adopted the substance of article 61.

Article 80. Rights and obligations of an issuer of non-intermediated securities

43. The Working Group agreed that reference should be made in article 80 to the law relating to the obligations of the issuer of non-intermediated securities rather than to non-intermediated securities. It was also agreed that the heading of the article (as well as the heading of section II of chapter VI and other articles in that section) should be aligned with the contents of the section and the relevant articles. Subject to those changes, the Working Group adopted the substance of article 80.

Article 99. Enforcement of a security right in non-intermediated securities

44. With respect to article 99, a number of suggestions were made. One suggestion was that the only elements of paragraph 1 that were asset specific and should thus be retained in the asset-specific rules of the enforcement chapter were the right of the secured creditor to collect funds owing under an intermediated security and the right to enforce the security right even before default with the agreement of the grantor. Another suggestion was that those elements should be reflected in a new provision that should focus on the right of a secured creditor to collect a receivable or negotiable instrument, and the funds credited to a bank account or the funds arising from a non-internediated security. Yet another suggestion was that paragraph 2 should be deleted as there was no good policy reason to require a court order if the issuer had not consented to out-of-court enforcement, as was done with respect to the right to payment of funds credited to a bank account in order to protect the depositary bank (see article 97, para. 2). There was sufficient support for all those suggestions. After discussion, the Working Group agreed that article 99 should be deleted.

45. In view of the understanding it reached in its discussion of article 99 with respect to the right of the secured creditor to enforce its security right by collecting the funds arising from certain types of assets, the Working Group decided that article 81, subparagraphs 2(e) and (f) that addressed post-default rights relating to security rights in types of asset dealt with in the asset-specific rules of the enforcement chapter should be deleted. The Working Group then proceeded to consider the structure of the remaining asset-specific rules in the enforcement chapter. It was agreed that articles 95-97 should be recast to focus on the right of the secured creditor to enforce its security right after default or before default with the agreement of the grantor by collecting a receivable, negotiable instrument, the funds credited in a bank account or the funds arising from a non-intermediated security. In addition, it was agreed that the references to the rights of third-party obligors, such as the debtor of the receivable, the issuer of a negotiable instrument, the depositary bank and the issuer of a non-intermediated security should be set out in a separate provision. Moreover, it was agreed that article 95, paragraph 3, should not apply to outright transfers of receivables. Finally, it was agreed that the secured creditor's right to enforce its security right by collecting should not preclude any of the general post-default rights of the secured creditor (e.g. the right to enforce the security right by selling the encumbered receivable, negotiable instrument or intermediated security). Subject to those changes, the Working Group adopted the substance of articles 95 to 97.

46. With respect to article 98 (negotiable documents and tangible assets covered), the Working Group agreed that it should be deleted, as it repeated the general rule that the secured creditor had the right to enforce its security right without adding any asset-specific rule and inappropriately provided that enforcement of a security right in a negotiable document could take place before default with the agreement of the grantor.

Article 115. Law applicable to a security right in non-intermediated securities

47. With respect to article 115, a number of suggestions were made. One suggestion was that paragraph 1 should be expanded to cover issues such as government consent, form, transferability and limitations to the creation of a security right in certificated

non-intermediated securities. Another suggestion was that paragraph 1 (and paragraph 4) might need to be revised to refer the effectiveness of a security right in a debt instrument (e.g. a State bond) against the issuer to the law chosen by the issuer or generally to the law governing the debt instrument. Another suggestion was that some creation and third-party effectiveness issues in paragraph 2 might need to be referred to the law of the State under which the issuer was constituted, rather than to the law of the State in which the certificate was located. Yet another suggestion was that paragraph 3 should be made subject to the law of the State under which the issuer was constituted as enforcement of the security right might involve a request to the issuer. Yet another suggestion was that enforcement might need to be referred to the law of the State in which the certificate was located or that, at least, some guidance should be provided as to the State in which enforcement might take place. After discussion, the Working Group requested the Secretariat to revise article 115 to address the suggestions made.

Article 55. Priority of a security right in negotiable instruments

48. Recalling its discussion of article 61 (see para. 42 above), the Working Group considered article 55. The concern was expressed that there might be some inconsistency between paragraph 1 (a security right made effective against third parties by possession has priority over a security right made effective against third parties by registration) and paragraph 2 (the same result, provided that certain conditions were met). In order to address that concern, a number of suggestions were made. One suggestion was that paragraph 1 should deal only with a priority conflict between security rights, while paragraph 2 should deal only with the conditions under which a buyer or other transferee would take free of a security right. That suggestion was objected to on the ground that it would result in treating secured creditors more favourably than buyers or other transferees of negotiable instruments.

49. Another suggestion was that paragraph 1 should be deleted and paragraph 2 should be the only priority rule in article 55 treating secured creditors and buyers or other transferees of negotiable instruments in the same way. Yet another suggestion, which would have the same result, was that paragraph 1 should deal with conflicts of priority between security rights. According to that suggestion, paragraph 2 should deal only with the question whether a buyer or other transferee of a negotiable instrument would acquire the negotiable instrument subject to or free of a security right that was made effective against third parties by registration. There was sufficient support for that suggestion.

50. With respect to the reference to good faith in subparagraph 2(b), while some support was expressed, it was agreed that it should be deleted, as absence of knowledge amounted essentially to good faith and the concept of good faith was used in the draft Model Law only to reflect an objective standard of conduct.

51. The Working Group next considered whether article 55 as revised should also be included in article 61. Diverging views were expressed. One view was that the matter was sufficiently important and should be addressed in the draft Model Law. Another view was that, while it was important, the matter was so complex that would require substantial work going beyond the mandate of the Working Group and thus should be left to the law of the enacting State relating to the transfer of securities. After discussion, the Working Group confirmed its earlier decision that paragraphs 6 and 7 of option A should be deleted and paragraph 8 and option B should be retained for further consideration (see para. 42 above).

C. Chapter II. Creation of a security right (A/CN.9/WG.VI/WP.61)

Article 5. Security agreement

52. With respect to article 5, it was agreed that the words “between the grantor and the secured creditor” in paragraph 1 should be retained outside square brackets, as

they reflected a distinction drawn in the Secured Transactions Guide between creation (effectiveness between the parties) and effectiveness against third parties. It was also agreed that the word "they" should be retained outside square brackets and the third set of bracketed words should be deleted. It was also agreed that the bracketed text both in subparagraph 2(c) and in the definition of the term "secured obligation" should be deleted, as there was no "secured obligation" in an outright transfer of receivables. It was further agreed that the draft Model Law should instead state that the references to "secured obligation" were not applicable to outright transfers of receivables.

53. While it was noted that the reference to article 7, paragraph 2, was intended to clarify that a security right in future assets would not be created until the grantor acquired rights in the assets or the power to encumber them, it was suggested that that matter might need to be addressed either directly in article 5 or indirectly by placing article 7, paragraph 2, right after article 5. Another suggestion was that that matter might be addressed in the definition of the term "grantor". It was agreed that the Secretariat should prepare text for the consideration of the Working Group at a future session. It was also agreed that the entire set of bracketed text in paragraph 3 should be replaced with the words "[concluded in] or [evidenced by]" with a note within square brackets that the enacting State should use the wording that would most closely suit its legal system. It was also agreed that paragraph 4 should be revised along the following lines "a security agreement may be oral if the secured creditor is in possession of the encumbered asset."

54. Subject to the above-mentioned changes (see paras. 52 and 53 above), the Working Group adopted the substance of article 5.

Article 6. Obligations that may be secured

55. It was suggested that articles 6 and 7 should be recast to refer directly to the security right rather than to the security agreement. Referring that drafting matter to the Secretariat, the Working Group adopted the substance of article 6 unchanged.

Article 7. Assets that may be encumbered

56. The Working Group adopted the substance of article 7 unchanged (see para. 55 above).

Article 8. Proceeds

57. With respect to article 8, a number of suggestions were made. One suggestion was that the definition of the term "proceeds" in article 2 should include a reference to "revenues". That suggestion was objected to, as the notion of revenues was encompassed in the term "civil fruits" contained in that definition. Another suggestion was that paragraph 1 should deal with the description of proceeds. That suggestion was also objected to, as the rule in article 5, subparagraph (d) that dealt with the description of an encumbered asset applied both to original encumbered assets and proceeds, as the proceeds were distinct assets. Yet another suggestion was that article 8 should clarify that a security right extended to proceeds even if the encumbered asset was sold, for example, with the consent of the secured creditor, and the buyer acquired it free of the security right. That suggestion was also objected to, as the combined application of articles 8 and 42 was sufficient to bring about that result. Yet another suggestion was that paragraph 2, which tracked recommendation 20 of the Secured Transactions Guide, should be further elaborated to provide guidance to States that might not have those asset-tracing rules. Subject to that change, the Working Group adopted the substance of article 8.

Article 9. Assets commingled in a mass or product

58. With respect to paragraph 2 of article 9, the concern was expressed that limiting a security right in a mass or product to the value of the encumbered assets commingled in a mass or product before commingling might be arbitrary and expose the secured creditor to commodity price fluctuations. In order to address that concern, the suggestion was made that the limit should rather be determined on the basis of other

criteria, such as weight or size, that were mentioned in the commentary of the Secured Transactions Guide (see chapter II, paras. 90-95). It was agreed that the matter should be reviewed at a future session on the basis of a note by the Secretariat. After discussion, the Working Group adopted the substance of article 9 unchanged.

Article 10. Anti-assignment clauses

59. It was agreed that article 10 should be recast to clearly indicate the parties to the agreement limiting the creation of a security right in a receivable. Subject to that change, the Working Group adopted the substance of article 10.

Article 11. Personal or property rights securing payment or other performance of encumbered receivables, negotiable instruments or any other intangible asset

60. With respect to article 11, a number of suggestions were made. One suggestion was that the word "supports" should be used to better reflect the function of a letter of credit. Another suggestion was that paragraph 2 should be clarified and its relationship with article 1, subparagraph 3(a), should be considered. Yet another suggestion was that paragraph 3 should also refer to negotiable instruments or other intangible assets. Yet another suggestion was that paragraphs 4 to 7 should be deleted and article 10 expanded to cover limitations agreed upon between the grantor and the obligor of a negotiable instrument or other intangible asset. There was sufficient support for all those suggestions.

61. The suggestion was also made that article 11 should clarify the meaning of personal and property rights securing or supporting payment or other performance of a receivable, negotiable instrument or intangible asset. It was noted, however, that that was a matter that both the Assignment Convention and the Secured Transactions Guide appropriately left to each State.

62. Subject to the above-mentioned changes (see para. 60 above), the Working Group adopted the substance of article 11.

Article 12. Rights to payment of funds credited to a bank account

63. With respect to article 12, it was agreed that there was no need to refer to article 78 (providing that the depositary bank did not need to recognize the secured creditor), as the draft Model Law should be read as a whole. It was also agreed that article 12 should be merged with article 10 as it dealt with contractual limitations to the creation of a security right. Subject to those changes, the Working Group adopted the substance of article 12.

Article 13. Negotiable documents and tangible assets covered

64. With respect to article 13, a number of suggestions were made. One suggestion was that the text in the definition of the term "possession" excluding articles 13 and 24 should be deleted, since otherwise the meaning of the term "possession" in those articles would be unclear. It was also suggested that the reference to the representative of the issuer should be deleted, as such a reference would create problems of interpretation and in any case the matter was sufficiently covered in the definition of the term "possession". In response, it was stated that recommendation 28 of the Secured Transactions Guide, on which article 13 was based, referred to possession by the issuer "directly or indirectly" to accommodate multi-modal bills of lading. Subject to those considerations, the Working Group adopted the substance of article 13.

Article 14. Tangible assets with respect to which intellectual property is used

65. With respect to article 14, a number of concerns were expressed. One concern was that it did not reflect clearly recommendation 243 of the Intellectual Property Supplement, on which it was based, namely that in the case of a tangible asset with respect to which intellectual property was used, two separate assets were involved and a security right in one did not automatically extend to the other. In order to address that concern, it was suggested that article 14 should be aligned more closely with

recommendation 243. While some doubt was expressed with respect to the use of the word "extend", there was sufficient support for that suggestion.

66. In response to a question on whether article 14 should address whether intellectual property was part of the tangible asset or not, it was noted that, in line with recommendation 243 on which it was based, article 14 appropriately left that matter to the law of the enacting State. It was also stated that, in a typical case where intellectual property was used with respect to tangible assets, a licence to use intellectual property rather than ownership in intellectual property was involved. In response to another question as to whether intellectual property could be described in a general manner, it was noted that a general description would be sufficient, unless a specific description was required under law relating to intellectual property (see Intellectual Property Supplement, para. 111).

67. Subject to the above-mentioned change (see para. 65 above), the Working Group adopted the substance of article 14.

Contractual limitations to the creation of a security right

68. Recalling its decision to delete the reference to "contractual limitations" in article 1, paragraph 7 (see para. 27 above), the Working Group proceeded to consider the treatment of such limitations in the draft Model Law. It was stated that articles 10 and 13 explicitly set aside contractual limitations to the creation of a security right in receivables and rights to receive payment of funds credited to bank accounts. In addition, it was observed that a general override of such contractual limitations was implicit in the fact that a contractual limitation was by definition binding only on the parties to the relevant contract and, under the draft Model Law, did not affect the priority of a security right created in violation of the contractual limitation. In response, it was pointed out that, while that understanding might be legitimate in some jurisdictions, in other jurisdictions, a contractual limitation might result in a party to the relevant contract not having the right to encumber an asset, with the result that a security right created in violation of that limitation would be ineffective. After discussion, it was agreed that the matter should not be addressed explicitly in the draft Model Law.

D. Chapter III. Effectiveness of a security right against third parties (A/CN.9/WG.VI/WP.61)

Article 15. General methods for achieving third-party effectiveness

69. With respect to article 15, a number of suggestions and concerns were expressed. One suggestion was that article 15 should refer to all methods for achieving third-party effectiveness, including control. That suggestion was objected to. It was widely felt that article 15 was properly cast to deal with general methods, while other methods applicable to specific types of asset were addressed in the asset-specific section of the chapter.

70. One concern was that the use of the present and past tense in the chapeau of article 15 ("the security right is effective … if it has been created") might inadvertently give the impression that third-party effectiveness could not be achieved by registration in advance of the creation of a security right. In order to address that concern, it was suggested that present tense should be used throughout the chapeau or it should be revised to read along the following lines "a security right created … is effective against third parties if …"). While support was expressed for that suggestion, it was stated that article 30 dealt with advance registration and that the draft Model Law should be read as a whole. It was also observed that the reference to creation of a security right as a condition for it to be effective against third parties might not be necessary as, unless created, a security right would not be a "security right" under the draft Model Law.

71. Yet another concern was that there might be some disconnect between the chapeau and subparagraph (b). In order to address that concern, it was suggested that

article 15 should be revised to state that a security right in an asset was effective against third parties if the secured creditor had possession of that asset. There was sufficient support for that suggestion. In a response to a concern that registration might create obstacles to non-notification factoring, the Working Group confirmed that transparency with respect to security rights was one of the key objectives of an efficient secured transactions law and thus, in line with the approach followed in the Secured Transactions Guide, registration should be listed in article 15 as a general method for achieving third-party effectiveness.

72. In the discussion, the suggestion was made that the reference to specialized registration systems should be retained in subparagraph (a) within square brackets with a footnote stating that enacting States that had such systems might wish to list them in this provision. That suggestion received sufficient support.

73. Subject to the above-mentioned suggestions (see paras. 70 and 71 above), the Working Group adopted the substance of article 15.

Article 16. Proceeds

74. With respect to article 16, a number of suggestions were made. One suggestion was that the words "without any further action by the grantor or the secured creditor" in paragraph 1 were redundant as they followed the word "automatically" and should thus be deleted. There was sufficient support for that suggestion. Another suggestion was that subparagraph 1(a) should be deleted. It was stated that, once the proceeds (e.g. inventory and receivables) were described in the notice (in line with the security agreement), they would not constitute proceeds but original encumbered assets. It was also observed that article 15 was sufficient in dealing with the third-party effectiveness of a security right in those assets. While the logic of that argument was generally recognized, the concern was expressed that deletion of subparagraph 1(a) might inadvertently give the impression that third-party effectiveness could be achieved only as provided in paragraph 2, a result that might reduce the level of transparency with regard to security rights in proceeds. It was also observed that recommendation 39 of the Secured Transactions Guide, on which article 16, paragraph 1, was based, referred to a generic, rather than a specific, description of the proceeds in the notice. Subject to the suggestions that received sufficient support, the Working Group adopted the substance of article 16.

Article 17. Changes in the method of third-party effectiveness

75. While there was general support in the Working Group for retaining article 17 outside square brackets, it was agreed that it should be reviewed once the Working Group had an opportunity to consider chapter V (priority). With respect to the formulation of article 17, a number of suggestions were made. One suggestion was that paragraph 1 should refer to the third-party effectiveness method applicable to the relevant encumbered asset. Another suggestion was that the word "subsequently" in paragraph 1 should be retained outside square brackets. Yet another suggestion was that paragraph 2 should clarify that the time when third-party effectiveness was achieved should be the time on the basis of which priority should be determined. Subject to those suggestions, the Working Group adopted the substance of article 17.

Article 18. Lapse in third-party effectiveness

76. It was agreed that article 18 should be retained outside square brackets. As to its formulation, a number of suggestions were made. One suggestion was that it could be separated into two paragraphs. Another suggestion was that reference should be made to the third-party effectiveness method applicable to the relevant type of encumbered asset. Yet another suggestion was that article 18 might be merged with article 17. Subject to those suggestions, the Working Group adopted the substance of article 18.

Article 19. Impact of a transfer of an encumbered asset

77. Diverging views were expressed as to whether article 19 should be retained. One view was that it dealt with a priority issue that was addressed in article 42 and should thus be deleted. Another view was that it usefully dealt with the impact of a transfer of an encumbered asset on the third-party effectiveness of a security right in that asset and should thus be retained. After discussion, the Working Group agreed that article 19 should tentatively be retained until the Working Group had an opportunity to consider articles 37 and 42.

Article 20. Change of the applicable law to this Law

78. After discussion, the Working Group approved the substance of article 20 unchanged.

Article 21. Acquisition security rights in consumer goods

79. Subject to the deletion of the words "without any further action by the grantor or the secured creditor" that were redundant as they followed the word "automatically", the Working Group approved the substance of article 21.

Article 22. Personal or property rights securing payment or other performance of receivables, negotiable instruments or any other intangible asset

80. It was agreed that article 22 should be deleted as it repeated the rule contained in article 11.

Article 23. Rights to payment of funds credited to a bank account

81. Subject to any consequential changes (see paras. 41 and 69-71 above), the Working Group adopted the substance of article 23.

Article 24. Negotiable documents and tangible assets covered

82. Subject to any consequential changes (see paras. 41 above), the Working Group adopted the substance of article 24.

E. Chapter V. Priority of a security right (A/CN.9/WG.VI/WP.61/Add.1)

Article 41. Competing security rights

83. The Working Group agreed that, while the rule in paragraph 3 should be addressed in paragraph 1, paragraph 3 should be deleted and paragraph 2 should be retained outside square brackets. Subject to those changes, the Working Group adopted the substance of article 41.

Article 42. Buyers and other transferees, lessees and licensees of an encumbered asset

84. The Working Group adopted the substance of article 42 unchanged.

Article 43. Buyers and other transferees, lessees and licensees of an encumbered asset in the case of specialized registration

85. It was agreed that subparagraph 1(b) should be deleted. It was also agreed that a note should be added to state that article 43 set out an example of a rule for the consideration of the enacting State. Subject to those changes, the Working Group adopted the substance of article 43.

New rule on advance registration

86. The Working Group agreed that the draft Model Law should include a new rule stating that in the case of advance registration, priority would date back to the time of advance registration.

Article 44. Insolvency representative [and creditors in the grantor's insolvency]

87. It was agreed that article 44 should be revised to reflect more clearly the essence of recommendations 4 of the UNCITRAL Legislative Guide on Insolvency Law and 238 and 239 of the Secured Transactions Guide. Subject to those changes, the Working Group adopted the substance of article 44.

Article 45. Preferential claims

88. The Working Group adopted the substance of article 45 and agreed that the definition of the term "competing claimant" should include a reference to preferential creditors.

Article 46. Other statutory claims

89. After discussion, it was agreed that article 46 should be deleted and the claims set out therein should be discussed in the Guide to Enactment as claims that the enacting State might wish to list in article 45.

Article 47. Rights of judgement creditors

90. Subject to recasting paragraph 2, the Working Group adopted the substance of article 47.

Article 48. Non-acquisition security rights competing with acquisition security rights

91. The Working Group adopted the substance of article 48 unchanged.

Article 49. Competing acquisition security rights

92. The Working Group adopted the substance of article 49 unchanged.

Article 50. Acquisition security rights competing with the rights of judgement creditors

93. The Working Group adopted the substance of article 50 unchanged.

Article 51. Proceeds

94. The Working Group adopted the substance of article 51 unchanged.

Article 52. Subordination

95. The Working Group adopted the substance of article 52 unchanged.

Article 53. Extent of priority

96. Subject to revising paragraph 1 to state more clearly the rule that priority of a security right with respect to future advances dated back to the time the security right was made effective against third parties, the Working Group adopted the substance of article 53.

Article 54. Irrelevance of knowledge of the existence of a security right

97. It was agreed that the words "subject to … of this Law" should be deleted and reference should be made to "knowledge" on the part of the secured creditor. Subject to those changes, the Working Group adopted the substance of article 54.

Article 55. Negotiable instruments

98. Recalling its earlier discussion of article 55 (see paras. 48-51 above), the Working Group agreed that the words "acquiring its rights by agreement" contained in the chapeau of paragraph 2 should be placed within square brackets for further consideration.

Article 56. Rights to payment of funds credited to a bank account

99. It was agreed that article 56 should be recast to state the rules contained therein more clearly and in a hierarchical order. Subject to those changes, the Working Group adopted the substance of article 56.

Article 57. Money

100. Subject to clarifying the use and the meaning of the term "transfer", the Working Group adopted the substance of article 57.

Article 58. Negotiable documents and tangible assets covered

101. The Working Group adopted the substance of article 58 unchanged.

Article 59. Certain licensees of intellectual property

102. Subject to stating the rule in a clearer manner and placing it within square brackets for further consideration, the Working Group adopted the substance of article 59.

Article 60. Acquisition security rights in intellectual property

103. It was agreed that the elements of article 60 should be incorporated into the acquisition financing provisions of the draft Model Law and article 60 should be retained within square brackets for further consideration. Subject to those changes, the Working Group adopted the substance of article 60.

B. Note by the Secretariat on a Draft Model Law on Secured Transactions

(A/CN.9/WG.VI/WP.61 and Add.1-3)

[Original: English]

Contents

Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. This Law applies to any right in movable assets that is created by agreement and secures the payment or other performance of an obligation, regardless of whether the parties have denominated it as a security agreement, the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation.

2. With the exception of articles 80-93 of this Law, the Law applies to outright transfers of receivables.

[3. Notwithstanding paragraphs 1 and 2 of this article, this Law does not apply to security rights in:

(a) Rights to draw under an independent undertaking or to receive the proceeds of an independent undertaking;

(b) 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 other law and the matters covered by this Law are addressed in that other law;

(c) Intellectual property in so far as this Law is inconsistent with law relating to intellectual property;[1]

(d) Intermediated securities;

(e) Payment rights arising under or from financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(f) Payment rights arising under or from foreign exchange transactions;

(g) Assets that are otherwise within the scope of this Law, if they are proceeds of assets that are outside the scope of this Laws, but only to the extent that other law applies to security rights in those assets; and

(h) […].][2]

[4. Notwithstanding paragraphs 1 and 2 of this article, this Law does not apply to a security right created in favour of an individual secured creditor for personal, family or household purposes.]

[5.] Nothing in this Law affects the rights and obligations of an individual grantor or a debtor of an encumbered receivable under laws relating to the protection of parties to transactions made for personal, family or household purposes.

[6. For the purposes of paragraphs 4 and 5 of this article, a transaction entered into by a [small enterprise] [microbusiness] is a transaction entered for personal, family or household purposes.]

[7.] Except as provided in articles 10 and 11 of this Law, nothing in this Law overrides contractual or legal limitations on the creation or enforcement of a security right in, or the transferability of, specific types of asset.

[*Note to the Working Group: With respect to consumer transactions, the Working Group may wish to note that: (a) paragraph 4, which is based on article 4, subparagraph 1 (a) of the* United Nations Convention on the Assignment of Receivables in International Trade *(the "*Assignment Convention*") and appears within square brackets as it may be inconsistent with recommendation 2, subparagraph (b) of the* UNCITRAL Legislative Guide on Secured Transactions *(the "*Secured Transactions Guide*"), is intended to exclude secured transactions in which*

[1] This provision may not be necessary if the enacting State has already coordinated, or has otherwise addressed the issue of hierarchy between, its secured transactions law and its intellectual property law.

[2] If the enacting State decides to introduce any other exception(s), they should be limited and set out in the Law in a clear and specific way.

the secured creditor is a consumer; (b) paragraph 5, which is based on article 4, paragraph 4 of the Assignment Convention*, is intended to implement the policy of recommendation 2, subparagraph (b) of the* Secured Transactions Guide*, resulting in the application of the draft Model Law to secured transactions in which the grantor or the debtor of an encumbered receivable is a consumer, without however, affecting any rights they may have under consumer protection legislation; and (c) both paragraphs 4 and 5 follow the formulation of the* Assignment Convention *(which followed the formulation of the* United Nations Convention on Contracts for the International Sale of Goods *(the "*CISG*"), article 2, subpara. (a)) and refer to the purpose of a transaction rather than to the term "consumer", as the exact meaning of that term would vary from State to State. The Working Group may wish to consider whether all provisions of the draft Model Law that preserve rights existing under other law should be set out in article 1 or whether paragraph 5 should be included in the section on the rights and obligations of the debtor of the receivable of the chapter on the rights of third-party obligors. The Working Group may also wish to note that paragraph 6 is intended to implement a suggestion made at the 24th session of the Working Group that the protection afforded by the draft Model Law to consumers might be extended to microbusinesses (A/CN.9/796, para. 47; as the* Secured Transactions Guide *does not take such an approach, this would be a policy change the Working Group may wish to consider). If the Working Group decides to retain paragraph 6, it may wish to consider whether a more neutral term could be used that would fit all States. In addition, the Working Group may wish to consider whether the guide to enactment of the draft Model Law (the "Guide to Enactment") should explain that the exact meaning of whatever term is used should be left to each enacting State, as what is a small or microbusiness would vary from State to State.*]

Article 2. Definitions

For the purposes of this Law:

(a) "Acquisition secured creditor" means a secured creditor that has an acquisition security right;

(b) "Acquisition security right" means a security right in a tangible asset or intellectual property 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;

[*Note to the Working Group: The Working Group may also wish to consider replacing the words "to enable" with the words "that enables" in that definition to ensure that a security right qualifies as an acquisition security right only if credit provided for the acquisition of an asset is in fact used for that purpose. The Guide to Enactment may have to explain that an acquisition secured creditor that also holds a non-acquisition security right is an acquisition secured creditor only with respect to the acquisition security right.*]

(c) "Bank account" means an account maintained by a bank, to which funds may be credited. The term includes a checking or other current account, as well as a savings or time deposit account. The term does not include a right against the bank to payment evidenced by a negotiable instrument;

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that the enacting State may wish to include a definition of the term "bank" in its secured transactions law or rely for this purpose on other law.*]

(d)

Alternative A

"Certificated non-intermediated securities" means non-intermediated securities represented by a written certificate;

Alternative B

"Certificated non-intermediated securities" means non-intermediated securities represented by a written certificate that:

(i) by its terms provides that the person entitled to the securities is the person in physical possession of the certificate ("bearer securities"); or

(ii) expressly identifies the person entitled to the securities [and is transferable by registration of the securities in the name of the transferee in the books maintained for that purpose by or on behalf of the issuer ("securities in registrable form")];

[*Note to the Working Group: The Working Group may wish to consider whether alternative A or B should be retained. If alternative B is retained, the Working Group may wish to consider whether the bracketed text in subparagraph (ii) should be retained. If retained, this text would exclude non-bearer certificated non-intermediated securities that are not transferable by registration in the issuer's books. A possible reason for that approach might be that a security right in, including a transfer for security purposes of, non-bearer certificated non-intermediated securities that are not transferable by registration in the issuer's books would be without much value as it cannot be made effective against the issuer. A reason for the deletion of the bracketed text might be that some legal systems recognize non-bearer certificated*
non-intermediated securities that are not transferable by registration in the issuer's books. The Working Group may also wish to note that the Guide to Enactment will explain that any reference to a "writing" throughout the draft Model Law is intended to cover electronic equivalents. Thus, a distinction will be drawn between uncertificated securities and securities represented by an electronic certificate.]

(e) "Competing claimant" means a creditor of a grantor or other person with rights in an encumbered asset that may be in conflict with the rights of a secured creditor in the same encumbered asset and includes:

(i) Another secured creditor of the grantor that has a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);

(ii) Another creditor of the grantor that has a right in the same encumbered asset;

(iii) The insolvency representative [and creditors] in the insolvency proceedings in respect of the grantor; or

(iv) A buyer lessee or licensee of the encumbered asset;

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in subparagraph (iii) should be retained, as in some jurisdictions the estate is represented by the insolvency representative, while in other jurisdictions the estate is represented by the mass of creditors.*]

(f) "Consumer goods" means tangible assets that an individual grantor uses or intends to use for personal, family or household purposes;

(g) "Control agreement" with respect to uncertificated non-intermediated securities means an agreement among the issuer, the grantor and the secured creditor, evidenced by a signed writing, according to which the issuer has agreed to follow instructions from the secured creditor with respect to the securities to which the agreement relates without further consent from the grantor;

[*Note to the Working Group: The Working Group may wish to note that the term "signed writing" is used only in subparagraphs (g) and (h) of this article, and the term "writing" is used in several articles (articles 2, subparas. (d), (w), (jj) and (ll), 5, para. 3, 28, paras. 1 and 2, 38, para. 2, 72, paras. 2 and 9, 74, paras. 1 and 2, 89, subpara. 2(b), and 91, paras. 1, 2(b) and 4). In this regard, the Working Group may wish to consider whether the functional equivalence rule reflected in recommendations 11 and 12 of the* Secured Transactions Guide *should be included in*

the draft Model Law or the Guide to Enactment to clarify that electronic equivalents of these terms are included in the draft Model Law. For example, rules along the following lines could be considered: "Writing includes an electronic communication if the information contained therein is accessible for subsequent reference; and 'Signed writing' includes an electronic communication signed electronically if: (a) a method is used to identify the person that signed and indicate that person's intention in respect of the information contained in the electronic communication; and (b) the method used is either: (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."]

(h) "Control agreement" with respect to rights to payment of funds credited to a bank account means an agreement among the depositary bank, the grantor and the secured creditor, evidenced by a signed writing, according to which the depositary bank has agreed to follow instructions from the secured creditor with respect to the payment of the funds credited to the bank account to which the agreement relates without further consent from the grantor;

(i) "Debtor" means a person that owes payment or other performance of a secured obligation and includes a secondary obligor such as a guarantor of a secured obligation. The term includes for convenience of reference a transferor in an outright transfer of a receivable. The debtor may or may not necessarily be the grantor;

(j) "Debtor of the receivable" means a person liable for payment of a receivable and includes a guarantor or other person secondarily liable for payment of the receivable;

(k) "Encumbered asset" means a movable, tangible or intangible, asset that is subject to a security right. The term also includes for convenience of reference a receivable that is the subject of an outright transfer;

(l) "Equipment" means a tangible asset used by a person in the operation of its business;

(m) "Future asset" means a movable asset, which does not exist or which the grantor does not own or have the power to encumber, at the time the security agreement is concluded;

(n) "Grantor" means a person that creates a security right to secure either its own obligation or that of another person. The term includes for convenience of reference the transferor in an outright transfer of a receivable;

[*Note to the Working Group: The Working Group may wish to consider whether the term "grantor" should also include a transferee of the encumbered assets (before and after enforcement).*]

(o) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(p) "Intangible asset" means all forms of movable assets other than tangible assets and includes incorporeal rights, receivables and rights to the performance of obligations other than receivables;

(q) "Intermediated securities" means securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

[*Note to the Working Group: The Working Group may wish to note that the definition of the term "intermediated securities" is exactly the same as the definition of that term in article 1, subparagraph (b) of the Unidroit Securities Convention. It is included here as it is used in article 1, subparagraph 3 (d) of the draft Model Law and in order to define the term "non-intermediated securities" (see subpara. (v) of this article). The Working Group may wish to consider the*

definitions of these terms to ensure coordination with the Unidroit Securities Convention and other national securities law.]

(r) "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);

(s) "Knowledge" means actual rather than constructive knowledge;

(t) "Mass or product" means tangible assets other than money that are so physically associated or united with other tangible assets that they have lost their separate identity;

(u) "Money" means currency currently authorized as legal tender by any State. It does not include funds credited to a bank account or negotiable instruments such as cheques;

[*Note to the Working Group: The Working Group may wish to note that the term "money", whose definition is based on a definition contained in the* Secured Transactions Guide*, is used in articles 1, subparagraph (t), 8, paragraph 2, 16, subparagraph 1 (b) and 57 of the draft Model Law*.]

(v) "Non-intermediated securities" means securities other than intermediated securities;

(w) "Notice" means a communication in writing;

[*Note to the Working Group: In view of the definitions of the term "notice" in the* Secured Transactions Guide *and in the* UNCITRAL Guide on the Implementation of a Security Rights Registry *(the "*Registry Guide*") and to avoid any ambiguity between a notice registered in the general security rights registry and a notice of enforcement, the Working Group may wish to consider whether a new term should be introduced and defined in this article to reflect a notice to be registered in the general security rights registry (see definition of the term "security right notice" below), while the current definition of the term "notice" could be retained to refer to other types of notice (e.g., given in the context of enforcement).*]

(x) "Notification of the security right" in a receivable means a notice sent by the grantor or the secured creditor to the debtor of the receivable;

[*Note to the Working Group: The Working Group may wish to note that the requirement for the identification of the encumbered receivable and the secured creditor that was included in a previous version of this definition (and in this definition in the* Secured Transactions Guide*), was moved to article 71, paragraph 1, as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in article 71, paragraph 1.*]

(y) "Original contract" means, in the context of a receivable created by contract, the contract between the creditor and the debtor of the receivable from which the receivable arises;

(z) "Possession" (except as the term is used in articles 13 and 24 with respect to the issuer of a negotiable document) means the actual possession only of a tangible asset by a person or an agent or employee of that person, or by an independent person that acknowledges holding it for that person. It does not include non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession;

(aa) "Priority" means the right of a secured creditor to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant;

(bb) "Proceeds" means whatever is received in respect of encumbered assets, including what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of an encumbered asset;

(cc) "Receivable" means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

[*Note to the Working Group: The Working Group may wish note that the Guide to Enactment will refer to the body of rules dealing with the establishment and operation of a registry for the purposes of receiving, storing and making accessible to the public information in registered notices with respect to security rights in movable assets that may be found in administrative guidelines (a Regulation), the secured transactions law or another law.*]

(dd) "Right to receive the proceeds under an independent undertaking" means the right to receive a payment due, a draft accepted or deferred payment incurred or another item of value, in each case to be paid or delivered by the guarantor/issuer, confirmer or nominated person giving value for a draw under an independent undertaking. The term also includes the right to receive payment in connection with the purchase by a negotiating bank of a negotiable instrument or a document under a complying presentation. The term does not include:

(i) The right to draw under an independent undertaking; or

(ii) What is received upon honour of an independent undertaking;

[*Note to the Working Group: The Working Group may wish to note that the definition of this term is included here only for the purposes of the articles in which this term is used, that is, article 1, subparagraph 3 (a), under which the right to receive the proceeds is excluded from the scope of the draft Model Law, and article 1, subparagraph 3 (g), under which the proceeds of an excluded type of asset are also excluded.*]

(ee) "Secured creditor" means a creditor that has a security right. For convenience of reference, the term also includes a transferee in an outright transfer of a receivable;

(ff) "Secured obligation" means an obligation secured by a security right. [For convenience of reference, the term also includes the amount owing by the transferor in the case of an outright transfer of a receivable;]

[*Note to the Working Group: The Working Group may wish to note that the bracketed text is intended to facilitate the application of the articles of the draft Model Law that include a reference to the term "secured obligation" to an outright transfer of receivables. Alternatively, text should be included in all relevant articles to address their proper application to outright transfers of receivables (see, for example, article 5, subpara. 2 (c) below). The Working Group may wish to note that the Guide to Enactment will explain that, as in other UNCITRAL texts, in the draft Model Law the singular includes the plural and vice versa (so, for example, a reference to the secured obligation would be sufficient to cover all present and future secured obligations.*]

(gg) "Security agreement" means an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that creates a security right. For convenience of reference, the term also includes an agreement for the outright transfer of a receivable;

(hh) "Securities" means:

[(i)] any share or similar right of participation in an issuer, an obligation of an issuer or the enterprise of an issuer that:

a. is one of a class or series, or by its terms is divisible into a class or series, of shares, participations or obligations; and

b. is, or is of a type, dealt in or traded on securities exchanges or financial markets, or is a medium for investment in the area in which it is issued or dealt in or traded; [or]

[(ii) the enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b. of this general definition, such as mutual funds.]

[*Note to the Working Group: The Working Group may wish to note that the definition of the term "securities" above is narrower than the definition of that term in article 1, subparagraph (a) of the Unidroit Securities Convention. The reason is that, while a broad definition is appropriate for the purposes of the Convention, it is overly broad for the purposes of the draft Model Law and could result in subjecting security rights in receivables, negotiable instruments, money and other generic intangible obligations to the special rules applicable to security rights in non-intermediated securities (see A/CN.9/802, para. 74). In any case, each enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of this term in its securities law.*]

(ii) "Security right" means a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right. For convenience of reference, the term also includes the right of the transferee in an outright transfer of a receivable;

(jj) "Security right notice" means a communication in writing [(paper or electronic)] to the registry of information with respect to a security right; a notice may be an initial notice, an amendment notice or a cancellation notice;

[*Note to the Working Group: The Working Group may wish to note that the bracketed text will not be necessary if the draft Model Law included the functional equivalence rules referred to above (see note to the term "control agreement"). Otherwise, it will have to be included in all articles that refer to a writing.*]

(kk) "Tangible asset" means all forms of corporeal movable asset, such as consumer goods, inventory and equipment; and

(ll) "Uncertificated non-intermediated securities" means non-intermediated securities that are not represented by a written certificate.

Article 3. Party autonomy

1. Except as otherwise provided in articles [4, …] of this Law, the parties may derogate from or vary by agreement the provisions of this Law relating to their respective rights and obligations.

2. The agreement referred to in paragraph 1 of this article does not affect the rights of any person that is not a party to the agreement.

[*Note to the Working Group: The Working Group may wish to note that this article: (a) is based on article 6 of the* Assignment Convention *(the first part of which is based on article 6 of the* CISG*) and recommendation 10 of the* Secured Transactions Guide *(which refers to specific mandatory law recommendations); and (b) is intended to refer not only to the secured creditor and the grantor but also to other parties whose rights may be affected by the draft Model Law, such as the debtor of an encumbered receivable and a competing claimant, while ensuring that any person not party to such an agreement will not be affected.*]

Article 4. General standard of conduct

1. A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.

2. The general standard of conduct set forth in paragraph 1 of this article cannot be waived unilaterally or varied by agreement.

Chapter II. Creation of a security right

A. General rules

Article 5. Security agreement

1. Subject to article 7, paragraph 2, of this Law, a security right is created and is effective [between the grantor and the secured creditor] if [they] [the grantor and the secured creditor] enter into a security agreement that satisfies the requirements of paragraphs 2 to 4 of this article.

2. A security agreement must:

(a) Provide for the creation of a security right, regardless of whether the parties have denominated it as a security right;

(b) Identify the secured creditor and the grantor;

(c) Describe the secured obligation [except in the case of an outright transfer of receivables];

(d) Describe the encumbered assets in a manner that reasonably allows their identification[; and

(e) Indicate the maximum monetary amount for which the security right may be enforced].[3]

3. Subject to paragraph 4 of this article, a security agreement must be [contained in] [concluded in] [evidenced by] [contained or concluded in, or evidenced by] a writing that satisfies the minimum content requirements of paragraph 2 of this article and is signed by the grantor.

4. A security agreement may be oral if accompanied by possession of the encumbered asset by the secured creditor.

[*Note to the Working Group: The Working Group may wish to consider whether the first bracketed text in paragraph 1 should be retained. While the relative effectiveness of a security right that this bracketed text introduces is consistent with the approach taken in the* Secured Transactions Guide*, it will be very difficult to implement in States in which the concept of relative effectiveness of a security right is unknown and in which a security right is by definition effective against all (*erga omnes*) upon its creation. If this bracketed text is retained, the Guide to Enactment may refer to an alternative approach referred to in the commentary of the* Secured Transactions Guide*, according to which a security right is effective against all upon its creation but, if there are competing rights, priority is to be resolved on the basis of the relevant priority rules. The Working Group may also wish to consider whether the bracketed text in subparagraph 2 (c) should be retained or the matter addressed in the definition of the term "secured obligation" (see article 2, subpara. (ff) above) and in the Guide to Enactment.*]

Article 6. Obligations that may be secured

A security agreement may provide for the creation of a security right that may secure any type of obligation, whether present or future, determined or determinable, conditional or unconditional, or fixed or fluctuating.

Article 7. Assets that may be encumbered

1. A security agreement may provide for the creation of a security right in any type of movable asset, parts of assets and undivided rights in assets.

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[3] This subparagraph should be included in the draft Model Law if the enacting State determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

2. A security agreement may provide for the creation of a security right in future assets but the security right is not created until the grantor acquires rights in the assets or the power to encumber them.

3. A security agreement may provide for the creation of a security right in all assets or categories of assets of a grantor, without identifying them individually.

Article 8. Proceeds

1. A security right in an encumbered asset extends to its identifiable proceeds.

2. Where proceeds in the form of money or funds credited to a bank account have been commingled with other assets of the same kind so that the proceeds are no longer identifiable:

(a) The amount of the proceeds immediately before they were commingled is to be treated as identifiable proceeds after commingling; and

(b) If, at any time after commingling, the balance credited to the bank account is less than the amount of the proceeds immediately before they were commingled, the sum of the balance credited to the bank account at the time that the balance is lowest plus the amount of any proceeds commingled thereafter is to be treated as identifiable proceeds.

Article 9. Assets commingled in a mass or product

1. A security right created in tangible assets before they were commingled in a mass or product continues in the mass or product.

2. A security right in tangible assets that continues in a mass or product pursuant to paragraph 1 of this article is limited to the value of the encumbered assets immediately before they became part of the mass or product.

B. Asset-specific rules

Article 10. Anti-assignment clauses

1. A security right in a receivable is effective as between the grantor and the secured creditor and as against the debtor of the receivable notwithstanding an agreement between the initial or any subsequent creditor and the debtor of the receivable limiting in any way the grantor's right to create a security right in its receivable.

2. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1 of this article, but the other party to the agreement may not avoid the original contract or the security agreement on the sole ground of the breach of that agreement, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 73, paragraph 2.

3. A person that is not a party to the agreement referred to in paragraph 1 of this article is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

4. This article applies only to receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the grantor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 24 of the* Secured Transactions Guide, *which in turn is based on article 9 of the* United Nations Convention on the Assignment of Receivables in International Trade *(the "*United Nations Assignment Convention*").*]

Article 11. Personal or property rights securing payment or other performance of receivables, negotiable instruments or any other intangible asset

1. A secured creditor with a security right in a receivable, negotiable instrument or any other intangible asset has the benefit of any personal or property right that secures payment or other performance of the receivable, negotiable instrument or other intangible asset automatically without any further action by either the grantor or the secured creditor.

2. If the right referred to in paragraph 1 of this article is an independent undertaking, the security right automatically extends to the right to receive the proceeds under the independent undertaking.

[3. This article does not affect a right in immovable property that under other law is transferable separately from a receivable that it may secure.][4]

4. A secured creditor with a security right in a receivable, negotiable instrument or any other intangible asset has the benefit of any personal or property right that secures payment or other performance of the receivable, negotiable instrument or other intangible asset notwithstanding any agreement between the grantor and the debtor of the receivable or the obligor of the negotiable instrument or any other intangible asset limiting in any way the grantor's right to create a security right in the receivable, negotiable instrument or other intangible asset or in any personal or property right securing payment or other performance of the receivable, negotiable instrument or other intangible asset.

5. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 4 of this article, but the other party to the agreement may not avoid the contract from which the receivable, negotiable instrument or other intangible asset arises, or the agreement creating the personal or property security right on the sole ground of the breach of that agreement, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 74, paragraph 2.

6. A person that is not a party to the agreement referred to in paragraph 4 of this article is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

7. Paragraphs 4 to 6 of this article apply only to security rights in receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the grantor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

[4] An enacting State may wish to consider implementing this paragraph only if it has a law such as the one described therein.

8. Paragraph 1 of this article does not affect any duties of the grantor to the debtor of the receivable, or the obligor of the negotiable instrument or any other intangible asset.

9. To the extent that the automatic effects of paragraph 1 of this article and article 24 are not impaired, this article does not affect any requirement under other law relating to the form or registration of the creation of a security right in any asset, securing payment or other performance of a receivable, negotiable instrument or any other intangible asset that is not covered in this Law.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 25 of the* Secured Transactions Guide, *which in turn is based on article 10 of the* United Nations Assignment Convention. *The Working Group may wish to consider whether the partial anti-assignment override stated in article 10 needs to be restated in paragraphs 4-6 of this article.*]

Article 12. Rights to payment of funds credited to a bank account

Subject to article 78 of this Law, a security right in a right to payment of funds credited to a bank account is effective notwithstanding an agreement between the grantor and the depositary bank limiting in any way the grantor's right to create the security right.

[*Note to the Working Group: The Working Group may wish to note that this article includes the part of recommendation 26 of the* Secured Transactions Guide *that relates to the creation of a security right, while the part that relates to the effects on the depositary bank are included in article 78*.]

Article 13. Negotiable documents and tangible assets covered

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the negotiable document or its representative is in possession of the asset at the time the security right in the document is created.

Article 14. Tangible assets with respect to which intellectual property is used

A security right in a tangible asset with respect to which intellectual property is used extends to the intellectual property only if the intellectual property is described in the security agreement in accordance with article 5, subparagraph 2 (d) of this Law.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 15. General methods for achieving third-party effectiveness

A security right is effective against third parties if it has been created in accordance with article 5 of this Law and:

(a) A notice with respect to the security right is registered in accordance with the provisions of chapter IV of this Law [or in a specialized registry or title certificate, if any, in accordance with other law]; or

(b) The possession of a tangible encumbered asset is transferred to or retained by the secured creditor.

[*Note to the Working Group: The Working Group may wish to note that control as a method for achieving third-party effectiveness is referred to in the asset-specific section of this chapter.*]

Article 16. Proceeds

1. If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset is effective against third parties automatically without any further action by the grantor or the secured creditor when the proceeds arise or are acquired if:

(a) The proceeds are described in the notice registered in accordance with article 34, subparagraph (c) of this Law; or

(b) The proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

2. If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset other than those referred to in paragraph 1 of this article is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] days after the proceeds arise; and

(b) Thereafter, if it is made effective against third parties by one of the methods referred to in in this chapter before the expiry of the time period provided in subparagraph (a).

[Article 17. Changes in the method of third-party effectiveness

1. A security right made effective against third parties by one of the methods referred to in this chapter may [subsequently] be made effective against third parties by any other method.

2. A security right that is effective against third parties continues to be effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.]

[Article 18. Lapse in third-party effectiveness

If third-party effectiveness of a security right lapses, it may be re-established by any of the methods referred to in this chapter and the security right is effective against third parties only as of the time of re-establishment.]

[*Note to the Working Group: The Working Group may wish to consider that articles 17 and 18 appear within square brackets for further consideration in view of the doubts expressed with respect to those articles at the 24th session of the Working Group, and in particular whether they address a third-party effectiveness or a priority issue (see A/CN.9/796, paras. 58-61). The Working Group may wish to consider whether articles 17 and 18 could be merged in one article, or deleted and addressed in the chapter on priority*.]

Article 19. Impact of a transfer of an encumbered asset

Except as provided in article 37 of this Law, a security right does not become ineffective against third parties solely because the encumbered asset is sold or otherwise transferred, leased or licensed.

[*Note to the Working Group: The Working Group may wish to consider whether the rule that a security right follows an encumbered asset in the hands of a transferee fits more in the chapter on creation, while the exceptions to this rule in the chapter on third-party effectiveness (impact on registration; see article 37) and in the chapter on priority (authorization of the transfer by the secured creditor or transfer in the ordinary course of business of the transferor; see article 42, paras. 2 to 8).*]

Article 20. Change of the applicable law to this Law

If a security right is effective against third parties under the law of another State whose law was applicable, and this Law becomes applicable, the following rules apply:

(a) The security right continues to be effective against third parties under this Law for [a short period of time to be specified by the enacting State] days after the change;

(b) The security right continues to be effective against third parties after the end of the time period referred to in subparagraph (a) if the third-party effectiveness requirements of this Law are satisfied before the expiry of that time period; and

(c) If the security right continues to be effective against third parties under subparagraph (a) and (b), the time when a notice with respect to the security right was registered in accordance with article 30 of this Law or third-party effectiveness was achieved is the time when it was achieved under the law of the other State.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that this article, which is based on recommendation 45 of the* Secured Transactions Guide*, is intended to apply to cases in which the draft Model Law becomes the applicable law by virtue of the conflict-of-laws rules of the forum (e.g., through a move of the location of the asset or the grantor to the enacting State) and is intended to give a secured creditor a grace period to ensure that the third-party effectiveness of its security right achieved under the previously applicable law continues under the draft Model Law (for a similar "transition" rule in the case of a change of the law of one and the same State, see rec. 231 of the* Secured Transactions Guide*).*]

Article 21. Acquisition security rights in consumer goods

An acquisition security right in consumer goods is automatically effective against third parties upon its creation without any further action by the grantor or the secured creditor.

[*Note to the Working Group: The Working Group May wish to note that the Guide to Enactment will clarify that an acquisition security right in consumer goods does not have the special priority of an acquisition security right over a security right registered in a specialized registry (see article 43).*]

B. Asset-specific rules

Article 22. Personal or property rights securing payment or other performance of receivables, negotiable instruments or any other intangible asset

1. A secured creditor with a security right in a receivable, negotiable instrument or any other intangible asset that is effective against third parties has the benefit of any personal or property right securing payment or other performance of the receivable, negotiable instrument or other intangible asset automatically without any further action by either the grantor or the secured creditor.

2. If the personal or property right referred to in paragraph 1 of this article is an independent undertaking, the third-party effectiveness of the security right automatically extends to the right to receive the proceeds under the independent undertaking.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 48 of the* Secured Transactions Guide*. The Working Group may wish to consider whether this article (or at least para. 1, which is identical to article 11, para. 1) should be subsumed in article 11 as it reaches the same result and thus can be deleted. The Working Group may also wish to note that the Guide to Enactment will explain that States parties to the* Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes *(Geneva, 1930; the*

*"*Geneva Uniform Law*") may wish to include in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right (see article 19; article 22 of the* United Nations Convention on International Bills of Exchange and International Promissory Notes *— the "*Bills and Notes Convention*" contains a similar rule).*]

Article 23. Rights to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account is effective against third parties, if it has been created in accordance with article 5 of this Law and:

(a) A notice with respect to the security right is registered in accordance with the provisions of chapter IV of this Law;

(b) The security right is in favour of the depositary bank;

(c) A control agreement has been entered into by the grantor, the secured creditor and the depositary bank; or

(d) The secured creditor has become the account holder.

Article 24. Negotiable documents and tangible assets covered

1. A security right in a negotiable document is effective against third parties, if it has been created in accordance with article 5 of this Law and:

(a) A notice with respect to the security right has been registered in accordance with the provisions of chapter IV of this Law; or

(b) Possession of the document has been transferred to or retained by the secured creditor.

2. If a security right in a negotiable document is effective against third parties, the corresponding security right in the asset covered by the document is also effective against third parties.

3. During the period when a negotiable document covers an asset, a security right in the asset may be made effective against third parties by the secured creditor's possession of the document.

4. A security right in a negotiable document that was made effective against third parties by the secured creditor's possession of the document continues to be effective against third parties for [a short period of time to be specified by the enacting State] after the negotiable document has been relinquished to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the negotiable document.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, depending on their law relating to negotiable documents, States may wish to include in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right in a negotiable document may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right.*]

Article 25. Non-intermediated securities

1. A security right in certificated non-intermediated securities is effective against third parties, if it has been created in accordance with article 5 of this Law and:

(a) The certificate is delivered to the secured creditor; [or]

(b) A notice with respect to the security right has been registered in accordance with the provisions of chapter IV of this Law; [or

(c) [The certificate has been endorsed in a manner indicating the intention to create and make effective against third parties a security right.]

2. A security right in uncertificated non-intermediated securities is effective against third parties, if it has been created in accordance with article 5 of this Law and:

(a) A notice with respect to the security right has been registered in accordance with the provisions of chapter IV of this Law;

(b) The security right has been noted or the name of the secured creditor as the holder of the securities has been entered into the books maintained for that purpose by or on behalf of the issuer; or

(c) A control agreement has been entered into by the grantor, the secured creditor and the issuer of the securities.

[*Note to the Working Group: The Working Group may wish to note that subparagraph 1 (c) of this article and paragraph 1 of article 61, both of which appear within square brackets for further consideration, may be necessary to avoid a conflict with article 19 of the* Geneva Uniform Law, *according to which a pledge of certificated securities may be created* erga omnes *by endorsement on the certificate, with the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a pledge (article 22 of the* Bills and Notes Convention *contains a similar rule). Alternatively, the matter may be addressed in the Guide to Enactment (see notes to articles 22 and 24 above). The Working Group may also wish to consider whether the creation* erga omnes *of a security right in shares by a notarial document or a document with certain date should also be addressed. The Working Group may also wish to note that the Guide to Enactment will clarify that: (a) a security right in non-intermediated securities (as in any other asset) that is made effective against third parties is also effective against the grantor's insolvency representative and the grantor's judgement creditors; and (b) the rights of transferees and competing secured creditors are not necessarily ordered temporally according to the time of third-party effectiveness but are rather subject to the special priority rules in article 61.*]

(A/CN.9/WG.VI/WP.61/Add.1) (Original: English)

Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Chapter IV. The registry system

A. General rules

Article 26. Establishment of the security rights registry

The security rights registry is established for the registration of security right notices in accordance with this Law and [the enacting State to include a reference to a regulation or law].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, depending on the legislative policy and drafting technique of the enacting State, the registration-related rules may be included partly in the secured transactions law and partly in administrative rules (a Regulation), or in separate laws (see* Registry Guide, *subpara. 9 (m)). The Working Group may also wish to consider which of the definitions of the* Registry Guide *may need to be added to article 2*.]

Article 27. Public access to registry services

1. The security rights registry is open to the public in accordance with this Law and [the enacting State to include a reference to a regulation or law].

2. Any person may submit a security right notice to the security rights registry for registration or submit a search request in accordance with [the enacting State to include a reference to a regulation or law].

Article 28. Grantor's authorization for registration

1. Registration of an initial security right notice is ineffective unless authorized by the grantor in writing, before or after registration.

2. Registration of an amendment security right notice is ineffective unless authorized by the grantor in writing, before or after registration, only if the amendment notice:

(a) Adds a description of new encumbered assets;

[(b) Increases the maximum amount for which the security right to which the registration relates may be enforced;]

(c) Adds a new grantor in which event the authorization of the new grantor is required unless the new grantor is a transferee of an encumbered asset described in a previously registered security right notice to which the amendment notice relates;

(d) […].

3. [Unless otherwise agreed,] a security agreement in accordance with article 5, paragraph 1, or a written agreement that amends the security agreement, is sufficient to constitute authorization by the grantor for the registration of an initial or amendment security right notice covering the assets described therein.

4. Evidence of the existence of the authorization of the grantor is not required for the registration of that notice.

[*Note to the Working Group: The Working Group may wish to note that the registration of an amendment security right notice that adds encumbered assets or increases the maximum amount may affect intervening secured creditors, and therefore takes effect only when the registration of the amendment security right notice (not the initial security right notice) becomes effective (see article 31, para. 3 below). The Working Group may also wish to note that: (a) if an amendment security right notice adds encumbered assets that are the proceeds of encumbered assets described in a previously registered security right notice, there is no need to obtain the grantor's additional authorization, as the security right extends to proceeds by law (see article 8, para. 1); and (b) if the proceeds are cash proceeds or are sufficiently described in a previously registered security right notice, there is no need to register an amendment notice (see article 8, para. 2). The Working Group may also wish to note that the bracketed text in paragraph 3 of this article, which was included at the request of the Working Group for further consideration (see A/CN.9/796), may not be necessary in view of the new text of article 3 on party autonomy*.]

Article 29. A security right notice may relate to more than one security right

A single security right notice may relate to one or more than one security right created by the grantor in favour of the same secured creditor whether they arise under one or more than one security agreement between the same parties.

[*Note to the Working Group: The Working Group may wish to consider whether in the text of this article or in the Guide to Enactment it should be pointed out that the registration of a single security right notice is sufficient to make effective against third parties a security right in encumbered assets that are not necessarily described in the security right notice, notably in cash proceeds (see article 16, subpara. 1 (b))*.]

Article 30. Time when a security right notice may be registered

An initial or amendment security right notice may be registered at any time, including after the conclusion of the security agreement, or of any agreement amending the security agreement, to which the notice relates, provided that registration is authorized by the grantor in accordance with article 28 of this Law.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 67 of the* Secured Transactions Guide *and recommendation 13 of the* Registry Guide.]

Article 31. Time of effectiveness of a registered security right notice

1. The registration of an initial or amendment security right notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

[2. The date and time when the information in an initial or amendment security right notice is entered into the registry record so as to be accessible to searchers is indicated in the public registry record.]

[3. Information in initial or amendment security right notices is entered into the registry record as soon as practicable after the notices are submitted and in the order in which they were submitted.]

4. The registration of a cancellation security right notice is effective from the date and time when the information in any initial or amendment security right notice to which it relates is no longer accessible to searchers of the public registry record.

[5. The date and time when the information in any initial or amendment security right notice to which a cancellation security right notice relates is no longer accessible to searchers is indicated in the registry record.]

[*Note to the Working Group: The Working Group may wish to consider whether paragraphs 2, 3 and 5 of this article that appear within square brackets should be deleted, while the Guide to Enactment could explain that these matters should be addressed in the annex to the draft Model Law*.]

Article 32. Period of effectiveness of a registered security right notice

Option A

1. A registered security right notice is effective for [a period of time, such as five years, to be specified by the enacting State].

2. The period of effectiveness of a registered security right notice may be extended by the registration of an amendment security right notice indicating this intent in the designated field of the notice within [a period of time, such as six months, to be specified by the enacting State] before its expiry.

3. The registration of an amendment security right notice in accordance with paragraph 2 of this article extends the period of effectiveness for [the period of time specified in paragraph 1 of this article] beginning from the time the current period would have expired if the amendment notice had not been registered.

Option B

1. A registered security right notice is effective for the period of time indicated by the registrant in the designated field of the notice.

2. The period of effectiveness of a registered security right notice may be extended at any time before its expiry by the registration of an amendment security right notice that indicates in the designated field a new period of effectiveness.

3. The registration of an amendment security right notice in accordance with paragraph 2 of this article extends the period of effectiveness for the period of time indicated in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

Option C

1. A registered security right notice is effective for the period of time indicated by the registrant in the designated field of the notice, not exceeding [a maximum period of time, such as 20 years, to be specified by the enacting State].

2. The period of effectiveness of a registered security right notice may be extended within [a period of time, such as six months, to be specified by the enacting State] before its expiry by the registration of an amendment security right notice that indicates in the designated field a new period of effectiveness not exceeding [the maximum period of time specified in paragraph 1 of this article].

3. The registration of an amendment security right notice in accordance with paragraph 2 of this article extends the period of effectiveness for the period of time specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

Article 33. Organization of information in registered security right notices

The registry record is organized so that the information in a registered initial and in any associated registered security right notices can be retrieved by a search of the registry record that uses the identifier of the grantor or the registration number assigned to the initial notice as the search criterion.

Article 34. Information required in an initial security right notice

An initial security right notice must contain the following items of information set out in the designated field for each item:

(a) The identifier and address of the grantor [and any additional item of information that the enacting State may decide to permit or require to be entered to assist in uniquely identifying the grantor];

(b) The identifier and address of the secured creditor or its representative; [and]

(c) A description of the encumbered asset in a manner that reasonably allows its identification;

[(d) The period of effectiveness of the registration];[5] and

[(e) A statement of the maximum amount for which the security right to which the registered security right notice relates may be enforced.][6]

[*Note to the Working Group: The Working Group may wish to note that many modern registries provide for serial number registration of serial number assets and consider whether serial number registration should be addressed in the draft Model Law or discussed only in the Guide to Enactment (see* Secured Transactions Guide, *chap. IV, paras. 34-36 and* Registry Guide, *paras. 131-134).*]

Article 35. Impact of a change of the grantor's identifier

1. If the grantor's identifier changes after a security right notice is registered and the secured creditor registers an amendment security right notice adding the new identifier of the grantor within [a short period of time, such as thirty days, to be specified by the enacting State] after the change, the security right to which the notice relates retains its third-party effectiveness and priority.

2. If the grantor's identifier changes after a security right notice is registered and the secured creditor registers an amendment security right notice adding the new identifier of the grantor after the expiration of the time period indicated in paragraph 1 of this article, the security right to which the security right notice relates is:

(a) Subordinate in priority to a competing security right with respect to which a security right notice is registered or which is otherwise made effective against third parties after the change in the grantor's identifier but before the registration of the amendment notice; and

(b) Ineffective against a person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before the registration of the amendment notice.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) if the secured creditor registers the amendment security right notice during the "grace period" contemplated in paragraph 1 of this article, the third-party effectiveness and priority of its security right is preserved as against the categories of competing claimants described in this article even if they acquired their rights prior to the registration of the amendment security right notice; (b) while a secured creditor's failure to register an amendment security right notice adding the grantor's new identifier has the negative priority consequences against the categories of competing claimants described in this article, it does not prejudice the third-party effectiveness or priority of its security right as against other categories of competing claimants such as the grantor's insolvency representative; (c) while the "grace period" begins to run from the time of the name change regardless of whether or not the secured creditor actually knew about the name, later registration of a security right amendment notice change after the expiry of that grace period will still protect the secured creditor as against the categories of*

[5] This provision will be necessary, if the enacting State implements option B or C of article 32.
[6] If the enacting State includes in its law article 5, subparagraph 2 (e) of the draft Model Law.

competing claimants described in this article if their rights arise after the registration; and (d) an amendment notice must be registered for the purposes of the rules stated in this article only if the name change would make the registration irretrievable by a searcher using the new name of the grantor as the search criterion.]

Article 36. Impact of errors in required information

1. An incorrect statement of the grantor identifier in a security right notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.

2. An incorrect or insufficient statement of the information required in a security right notice other than the grantor's identifier does not render the registration ineffective unless the error would seriously mislead a reasonable searcher.

Article 37. Impact of a transfer of an encumbered asset

Option A

1. If an encumbered asset covered by a registered security right notice is transferred after the notice is registered and the secured creditor registers an amendment security right notice adding the transferee's name as a new grantor within [a short period of time, such as thirty days, to be specified by the enacting State] after the transfer, the security right to which the initial security right notice relates retains its third-party effectiveness and priority.

2. If the secured creditor registers an amendment notice adding the transferee's name as a new grantor after the expiration of the time period indicated in paragraph 1 of this article, the security right to which the notice relates is:

(a) Subordinate in priority to a competing security right with respect to which a security right notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment security right notice; and

(b) Ineffective as against the right of a person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment security right notice.

Option B

1. If an encumbered asset covered by a registered security right notice is transferred after the notice is registered and the secured creditor registers an amendment security right notice adding the transferee's name as a new grantor within [a short period of time, such as thirty days, to be specified by the enacting State] after the transfer, the security right to which the initial security right notice relates retains its third-party effectiveness and priority.

2. If the secured creditor registers an amendment notice adding the transferee's name as a new grantor after expiration of the time period indicated in paragraph 1 of this article, starting when the secured creditor acquires knowledge about the transfer of the encumbered asset, the security right to which the notice relates:

(a) Is subordinate in priority to a security right with respect to which a security right notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice; and

(b) Is ineffective as against a right of a person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice.

Option C

A security right to which the security right notice relates retains its third-party effectiveness and priority notwithstanding a transfer of the encumbered asset covered by the registered security right notice.

[*Note to the Working Group: The Working Group may wish to consider whether it should be clarified in this article or in the Guide to Enactment that this article does not apply to outright transfers of receivables. Outright transfers of receivables fall within the scope of the Law and the transferee must register in order to make its right effective against third parties in the same way as a secured creditor that acquires a security right in receivables. The Working Group may also wish to note that the Guide to Enactment will clarify that, if a State adopts option C, it will not need to implement article 40, which includes the same rule with respect to transfers of intellectual property*.]

Article 38. Secured creditor's authorization

1. The person named in the initial security right notice as the secured creditor may register an amendment or cancellation security right notice relating to that initial security right notice at any time.

Option A

2. The registration of an amendment or cancellation security right notice is effective regardless of whether it is authorized by the person named in the initial security right notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

Option B

2. The registration of an amendment or cancellation security right notice is effective regardless of whether it is authorized by the person named in the initial security right notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

3. The registration of an amendment or cancellation security right notice which is not authorized by the person named in the initial security right notice as the secured creditor does not affect the priority of the security right to which it relates as against the right of a competing claimant over which the security right had priority before the registration of the amendment or cancellation security right notice.

Option C

2. The registration of an amendment or cancellation security right notice is ineffective unless it is authorized by the person named in the initial security right notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

Option D

2. The registration of an amendment or cancellation security right notice is ineffective unless it is authorized by the person named in the initial security right notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

3. The registration of an amendment or cancellation security right notice which is not authorized by the person named in the initial security right notice as the secured creditor does not affect the priority of the security right to which it relates as against the right of a competing claimant which would have priority if the registration were treated as effective and which was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation security right notice, provided the competing claimant did not have knowledge that the registration of the security right notice was unauthorized at the time it acquired its right.

[*Note to the Working Group: The Working Group may wish to note that the matter addressed in this article was not dealt with in the* Secured Transactions Guide *but it was discussed in the Registry Guide (paras. 258-268). The Working Group may also wish to consider whether options C and D of this article are compatible with the* Secured Transactions Guide *(rec. 74) and the* Registry Guide *(rec. 20), according to which upon registration of a cancellation security right notice, information contained in a registered security right notice is to be removed from the public registry record and archived*.]

Article 39. Compulsory registration of an amendment or cancellation security right notice

1. The secured creditor must register an amendment or cancellation security right notice, as the case may be, if:

(a) The registration of an initial or amendment security right notice has not been authorized by the grantor at all or the security right notice contains information that exceeds the scope of the grantor's authorization;

(b) The registration of an initial or amendment security right notice has been authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded;

(c) The security agreement to which the registered security right notice relates has been revised in a way that makes some or all of the information contained in the security right notice incorrect or insufficient and the grantor has not otherwise authorized the registration; or

(d) The security right to which the security right notice relates has been extinguished by payment or other performance of the secured obligation or otherwise and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets to which the security right notice relates.

2. If the secured creditor does not comply with a written request from the grantor to register an amendment or cancellation security right notice within [a short period of time, such as fifteen days, to be specified by the enacting State] after receipt of the grantor's request, the grantor is entitled to seek the registration of an amendment or cancellation security right notice, as the case may be, through [a summary judicial or administrative procedure to be specified by the enacting State].

3. The grantor is entitled to seek the registration of an amendment or cancellation security right notice, as the case may be, in accordance with the procedure referred to in paragraph 2 of this article even before the expiry of the time period specified therein, provided that [the enacting State should introduce appropriate measures to protect the secured creditor].

4. An amendment or cancellation security right notice, as the case may be, ordered to be registered in accordance with the procedure referred to in paragraph 2 of this article is registered by

Option A

[the registrar to be specified by the enacting State] as soon as practicable after the security right notice is submitted to the registry for registration with a copy of [the relevant judicial or administrative order to be specified by the enacting State] attached.

Option B

[the judicial or administrative officer to be specified by the enacting State] who ordered the security right notice to be registered as soon as practicable after the issuance of [the relevant judicial or administrative order to be specified by the enacting State] with a copy thereof attached.

[*Note to the Working Group: The Working Group may wish to consider that some modern secured transactions laws provide for the registration of other types of*

notices (e.g. enforcement notices and notices of preferential claims) and consider whether registration of such notices should be foreseen in the draft Model Law or discussed only in the Guide to Enactment (see Registry Guide, *paras. 51 and 52).*]

B. Asset-specific rules

Article 40. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

A security right in intellectual property to which the security right notice relates retains its third-party effectiveness and priority notwithstanding a transfer of the encumbered intellectual property covered by the registered security right notice. [If the security right is registered in [enacting State to specify the relevant intellectual property registry, if any] article 42, paragraph 3, of this Law applies.]

[*Note to the Working Group: The Working Group may wish to note that, while this article is based on recommendation 244 of the* Intellectual Property Supplement, *its formulation has been aligned with the formulation of option C of article 37 of the draft Model Law. The Working Group may also wish to note that the Guide to Enactment will explain that, if a State adopts option C of article 37, it will not need to implement this article. Finally, the Working Group may wish to consider the bracketed text, which is intended to ensure that this article will not inadvertently override the special priority rules applying to security rights notice of which is registered in an intellectual property registry, if any.*]

Chapter V. Priority of a security right

A. General rules

Article 41. Competing security rights

1. Subject to articles 42-51 of this Law, priority among competing security rights created by the same grantor in the same encumbered asset is determined according to the order of third-party effectiveness or advance registration in accordance with the provisions of chapter IV of this Law.

[2. The priority of a security right is not affected by a change in the method by which it is made effective against third parties, provided that there is no time during which the security right is not effective against third parties.]

[3. The priority of a security right extends to all encumbered assets described in the initial registered security right notice, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

4. The time when third-party effectiveness is achieved or the time advance registration takes place with respect to a security right in an encumbered asset in accordance with the provisions of chapter IV of this Law is also the time third-party effectiveness is achieved or advance registration takes place with respect to a security right in its proceeds.]

[*Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article reflects in general terms recommendation 76 of the* Secured Transactions Guide, *and refers to third-party effectiveness (which requires creation and a third-party effectiveness act) and advance registration (i.e. before the creation of the security right or conclusion of the security agreement and thus before third-party effectiveness is achieved). In this regard, the Working Group may wish to consider whether in all the articles of this chapter or in the Guide to Enactment it should be clarified that, upon creation, a security right that has become the subject of advance registration has the same priority as a security right that has been made effective against third parties. The Working Group may also wish to note that the Guide to Enactment will explain that paragraph 1 deals with: conflicts of priority:*

(a) among security rights that were made effective against third parties by registration; (b) among security rights that were made effective against third parties otherwise than by registration; and (c) among security rights that were made effective against third parties by registration and security rights that were made effective against third parties otherwise than by registration (always in the security rights registry). The Working Group may wish to note that paragraph 2 of this article may need to be coordinated with articles 17 and 18 and article 24 (see A/CN.9/WG.VI/WP.61). The Working Group may also wish to consider whether paragraphs 3 and 4 are necessary and should be retained or whether they should be deleted and the matters addressed therein discussed in the Guide to Enactment.]

Article 42. Buyers or other transferees, lessees and licensees of an encumbered asset

1. If an encumbered asset is sold or otherwise transferred, leased or licensed and a security right in that asset is effective against third parties at the time of the sale or other transfer, lease or licence, a buyer or other transferee, lessee or licensee acquires its rights subject to the security right except as provided in this article.

2. A buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorizes a sale or other transfer of the asset free of the security right.

3. The rights of a lessee or licensee of an encumbered asset are not affected by a security right if the secured creditor authorizes the grantor to lease or license the asset unaffected by the security right.

4. A buyer of a tangible encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the conclusion of the sale agreement, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement.

5. The rights of a lessee of a tangible encumbered asset leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. Subject to article 59 of this Law, the rights of a non-exclusive licensee of an intangible encumbered asset licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.

7. If a buyer or other transferee of a tangible encumbered asset acquires its rights free of a security right, any subsequent buyer or other transferee also takes that asset free of that security right.

8. If the rights of a lessee of a tangible encumbered asset or licensee of an intangible encumbered asset are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by the security right.

Article 43. Buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration

1. A security right in an asset that is made effective against third parties by registration in [the enacting State to specify the specialized registration system, if any] has priority over:

(a) A security right in the same asset which is made effective against third parties by any other method or with respect to which advance registration has taken place in accordance with chapter IV of this Law, regardless of the order of registration; and

(b) A security right in the same asset that is subsequently registered in [the enacting State to specify the specialized registration system, if any].

2. If an encumbered asset is sold or otherwise transferred, leased or licensed and, at the time of the transfer, lease or licence, a security right in that asset is effective against third parties by registration in [the enacting State to specify the specialized registration system, if any], the buyer or other transferee or lessee acquires its rights subject to the security right, except as provided in paragraphs 2-8 of article 42.

3. If a security right in an asset has not been made effective against third parties by registration in [the enacting State to specify the specialized registration system, if any], a buyer or other transferee acquires its rights free of the security right and a lessee's or licensee's rights are unaffected by the security right.

[*Note to the Working Group: Although subparagraph 1 (b) of this article is based on recommendation 70, subparagraph (b) of the* Secured Transactions Guide, *the Working Group may wish to consider whether it should be retained as the priority of rights registered in a specialized registry is a matter for the relevant specialized registration law. The Working Group may wish to consider whether words along the lines of the following: "or with respect to which advance registration has taken place in accordance with chapter IV of this chapter" should be added to all priority rules next to the words "a security right that is effective against third parties" to indicate that, upon its subsequent creation, the third-party effectiveness and priority of a security right that has become the subject of advance registration goes back to the time of advance registration*.]

[Article 44. Insolvency representative [and creditors in the grantor's insolvency]]

A security right that is effective against third parties retains the third-party effectiveness and priority it had before the commencement of insolvency proceedings with respect to the grantor over the rights of the grantor's insolvency representative [and the creditors in the grantor's insolvency].]

[*Note to the Working Group: The Working Group may wish to consider the reference to the grantor's creditors in insolvency within square brackets which is intended to address situations in which, under insolvency law, the insolvency representative does not represent the mass of creditors. The Working Group may also wish to note that the Guide to Enactment will explain that this rule is subject to any insolvency law rules with respect to issues, such as avoidance and statutory preferential claims (which in federal States have priority over security rights by definition as insolvency law is federal law and secured transactions law is state law)*.]

Article 45. Preferential claims

The following claims arising by operation of law have priority over a security right that is effective against third parties and only up to [the enacting State to specify the amount for each category of claim]:

(a) […];

(b) […].[7]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) this article applies outside insolvency, while a similar rule is recommended in the Secured Transactions Guide with respect to preferential claims in the case of the grantor's insolvency (see rec. 239); (b) a notice with respect to preferential claims may be registered in the security rights registry; (c) in the case of enforcement, if a preferential creditor does not take over the enforcement process, its claim will have to be paid ahead of the claims of secured creditors; and (d) secured creditors should obtain representations from grantors about debts to preferential creditors and otherwise address the possible existence of such claims. The Guide to Enactment will also explain that the enacting State will need to consider whether any preferential claims will be applicable only if the grantor*

[7] The enacting State will not need this article if it does not have any preferential claims.

is insolvent and thus be set out in insolvency law or whether they will also apply outside of insolvency and thus be listed also in secured transactions law. The Working Group may also wish to consider whether preferential creditors should be included in the definition of the term "competing claimant" (creditors with a right in an encumbered asset, such as judgement creditors, are included).]

[Article 46. Other statutory claims

1. The right of a creditor that has provided services with respect to an encumbered asset has priority over a security right that is effective against third parties up to the value of the asset in the possession of that creditor and up to the reasonable value of the services rendered.

2. The right of an unpaid [supplier] [seller] of tangible assets under other law to reclaim them has priority over a security right in the assets, unless it was made effective against third parties before the [supplier] [seller] exercised its reclamation right.

3. […].[8]]

[*Note to the Working Group: The Working Group may wish to note that this article refers to statutory rights under other law and, to the extent it deals with rights that have by law priority over security rights, this article may be merged with article 45. Noting that supply contracts may include service contracts that provide also for the supply of goods (that is the reason for the inclusion in paragraph 2 of the word "supplier" which is broader than the word "seller"), the Working Group may also wish to consider whether to refer to supplier claims so as to preserve the priority of supplier reclamation claims existing under other law. Alternatively, the Working Group may wish to consider whether this article should be deleted and the matter addressed in the Guide to Enactment.*]

Article 47. Rights of judgement creditors

1. Subject to article 50 of this Law, a security right that is effective against third parties has priority over the rights of an unsecured creditor that has obtained a judgement or provisional order ("judgement creditor"), unless, before the security right is made effective against third parties or becomes the subject of advance registration in accordance with the provisions of chapter IV of this Law, the judgement creditor [the enacting State to specify the steps necessary for a judgement creditor to acquire rights in the encumbered asset or to refer to the relevant provisions of other law with respect to judgements or provisional court orders].

2. The priority of the security right extends to credit disbursed by the secured creditor:

(a) Before the expiry of [the enacting State to specify a short period of time, such as 30 days] after the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1 of this article; or

(b) Pursuant to an irrevocable commitment in a fixed amount or an amount to be fixed pursuant to a specified formula of the secured creditor to extend credit, if the commitment was made before the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1 of this article.

[*Note to the Working Group: The Working Group may wish to note that this article is intended to reflect recommendation 84 of the* Secured Transactions Guide. *Noting that the term "judgement creditor" is defined in paragraph 1 of this article, the Working Group may wish to consider including instead in article 2 a definition of this term along the following lines: "'Judgement creditor' means an unsecured creditor that has obtained a judgement or provisional court order against the grantor and [the enacting State to specify the steps necessary for a judgement creditor to acquire rights in the encumbered asset or to refer to the relevant provisions of other*

[8] If a State decides to list any additional claims that have priority over a security right, they should be limited both in type and amount, and described in a clear and specific way in this article.

law with respect to judgements or provisional court orders]". In this respect, the Working Group may wish to note that, in some States, these steps involve registration of a notice in the security rights registry, seizure of assets or service of a garnishment order, matters that may be usefully clarified in the Guide to Enactment. In States that require registration about these enforcement steps, judgement creditors have the same priority rights as secured creditors, that is, in other words, the general first-to-register priority rule applies. The Working Group may also wish to consider whether the secured creditor should lose its priority under subparagraph 2 (b) of this article only if it received the notification and, if so, whether this matter should be clarified in subparagraph 2 (b) of this article or in the Guide to Enactment.]

Article 48. Non-acquisition security rights competing with acquisition security rights[9]

Alternative A[10]

1. Except as provided in article 43 of this Law:

(a) An acquisition security right in a tangible asset other than inventory or consumer goods has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of the asset; or

(ii) A security right notice with respect to the acquisition security right is registered in accordance with the provisions of chapter IV of this Law within [a short period of time, such as thirty days, to be specified by the enacting States] after the grantor obtains possession of the asset;

(b) An acquisition security right in inventory has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of the inventory; or

(ii) Before the grantor obtains possession of the inventory:

a. A security right notice with respect to the acquisition security right registered in accordance with the provisions of chapter IV of this Law; and

b. A notice that is sent by the acquisition secured creditor is received by the non-acquisition secured creditor that has registered a security right notice in accordance with the provisions of chapter IV of this Law with respect to a security right created by the grantor in inventory of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the inventory sufficiently to enable the non-acquisition secured creditor to identify the inventory that is the object of the acquisition security right; and

(c) An acquisition security right in consumer goods has priority over a competing non-acquisition security right created by the grantor in the same goods.

2. A notice that is sent pursuant to subparagraph 1(b)(ii)b. of this article, may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction and is sufficient only for security rights

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[9] This section includes the unitary-approach recommendations of the *Secured Transactions Guide*. If a State prefers to adopt the non-unitary approach recommendations, it may wish to consider implementing instead recommendations 187-202 of the *Secured Transactions Guide*. [In particular, States may wish to consider doing so if they have implemented regional legislation along the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (the "Late Payment Directive"), article 9 of which, provides that "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".]

[10] A State may adopt alternative A or alternative B of this article.

in tangible assets of which the grantor obtains possession within [a period of time, such as five years, to be specified by the enacting State] after the notice is received.

Alternative B

Except as provided in article 43 of this Law:

(a) An acquisition security right in a tangible asset other than consumer goods has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of the asset; or

(ii) A security right notice with respect to the acquisition security right is registered in accordance with the provisions of chapter IV of this Law within [a short period of time, such as thirty days, to be specified by the enacting State] after the grantor obtains possession of the asset; and

(b) An acquisition security right in consumer goods has priority over a competing non-acquisition security right created by the grantor in the same goods.

[*Note to the Working Group: The Working Group may wish to note that subparagraph (b)(ii)b. of this article refers to a notice received by an earlier registered inventory financier and consider whether the receipt rule should apply to any notice sent to a person under the draft Model Law*.]

Article 49. Competing acquisition security rights

1. Subject to paragraph 2 of this article, the priority between competing acquisition security rights is determined according to article 41 of this Law.

2. An acquisition security right of a seller or lessor that was made effective against third parties within the period specified in article 48, subparagraph (a) (ii), of this Law has priority over a competing acquisition security right of a secured creditor other than a seller or lessor.

Article 50. Acquisition security rights competing with the rights of judgement creditors

An acquisition security right that is made effective against third parties within the period specified in article 48, subparagraph (a) (ii), of this Law has priority over the rights of a judgement creditor that would otherwise have priority under article 47 of this Law.

[*Note to the Working Group: The Working Group may wish to consider whether this article should be merged with article 47*.]

Article 51. Proceeds[11]

Alternative A

1. A security right in proceeds of a tangible asset other than inventory or consumer goods has the same priority as the acquisition security right in that asset.

2. A security right in proceeds of inventory has the same priority as the acquisition security right in that inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account or rights to receive the proceeds under an independent undertaking.

3. A security right in proceeds has the same priority as the security right in that inventory, provided that the acquisition secured creditor notifies non-acquisition secured creditors that, before the proceeds arose, the acquisition secured creditor registered a security right notice with respect to assets of the same kind as the proceeds in accordance with the provisions of chapter IV of this Law.

[11] A State may adopt alternative A of this article, if it adopts alternative A of article 49, or alternative B of this article if it adopts alternative B of article 48.

Alternative B

Notwithstanding article 48 of this Law, the priority of an acquisition security right in a tangible asset that is effective against third parties does not extend to its proceeds.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, as the draft Model Law does not deal with insolvency-related matters, no article has been included in the draft Model Law to deal with the application of these special priority rules in the case of insolvency (rec. 186 of the* Secured Transactions Guide*). However, there is nothing in these articles to imply that insolvency law will not operate against the background of secured transactions law and thus that these provisions will not apply to acquisition security rights in the case of insolvency*.]

Article 52. Subordination

1. A person may at any time subordinate its priority under this Law in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.

[*Note to the Working Group: The Working Group may wish to consider whether a subordination agreement has to be in writing or may also be oral. The Working Group may also wish to consider whether the Guide to Enactment should explain whether, if third-party effectiveness of the security right has been established by registration of a security right notice, an amendment security right notice may be registered to reflect the new order of priority. The Working Group may also wish to note that the Guide to Enactment will explain that a subordination agreement may be between a secured creditor and a grantor, between two or more secured creditors, or between a secured creditor and another competing claimant (e.g. a judgement creditor or an insolvency representative). The Guide to Enactment will also discuss circular priority problems that may result from subordination agreements. The Working Group may wish to consider that the rule that an agreement cannot affect third parties is not enough to cover unilateral subordination and thus paragraph 2 of this article is necessary and should be retained*.]

Article 53. Extent of priority

[1.] Subject to article 47 of this Law, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

[2. The priority of the security right is limited to the maximum amount set out in the security right notice registered in accordance with the provisions of chapter IV of this Law.][12]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 97 and 98 of the* Secured Transactions Guide. *The Working Group may also wish to consider whether paragraph 2 of this article should be included in article 40*.]

Article 54. Irrelevance of knowledge of the existence of a security right

Subject to articles 42, paragraphs 4-6, 55, subparagraph 2 (b), 56, paragraph 6, 59, paragraph 1, and 61, subparagraph 7 (b), of this Law knowledge of the existence of a security right on the part of a competing claimant does not affect its priority.

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[12] If the enacting State implements article 34, subparagraph (e), it may wish to include in this article paragraph 2.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, although knowledge of the existence of a security right does not affect priority, knowledge that a transaction violates the rights of a secured creditor may affect priority*.]

B. Asset-specific rules

Article 55. Negotiable instruments

1. [Except as provided in paragraph 2 of this article], a security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority over a security right in a negotiable instrument that is made effective against third parties by any other method.

2. A security right in a negotiable instrument that is made effective against third parties by a method other than possession of the instrument is subordinate to the rights of a secured creditor, buyer or other transferee acquiring its rights by agreement that:

(a) Qualifies as a protected holder [the enacting State may wish to use any other term used in its law]; or

(b) Takes possession of the negotiable instrument and gives value [the enacting State may wish to use any other term used in its law] in good faith and without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 101 and 102 of the* Secured Transactions Guide. *The words added at the beginning of paragraph 1 of this article within square brackets are intended to avoid a potential inconsistency between paragraph 1 (possession beats any other possible method) and paragraph 2 (possession does not beat protected holder or a secured creditor, buyer or other consensual transferee that takes in good faith). The Working Group may wish to note that the reference to "good faith" in subparagraph 2 (b) may be redundant and inconsistent with the agreement of the Working Group that reference to good faith should only be made to reflect an objective standard of conduct and not what a person knew, a matter covered sufficiently in subparagraph 2 (b) (see A/CN.9/802, para. 31). Depending on it decision as to whether reference should be made in articles 32 and 69 on non-intermediated securities, reference may need to be made in this article and in a new article on the third-party effectiveness of security rights in negotiable instruments to endorsement in pledge of a negotiable instrument*.]

Article 56. Rights to payment of funds credited to a bank account

1. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a method other than registration of a security right notice in accordance with the provisions of chapter IV of this Law has priority over a competing security right made effective against third parties by such registration.

2. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a control agreement has priority over a competing security right other than a security right of the depositary bank or a security right that is made effective against third parties by any method other than by the secured creditor becoming the account holder.

3. The order of priority among competing security rights in a right to payment of funds credited to a bank account that are made effective against third parties by control agreements is determined on the basis of the time of conclusion of the control agreements.

4. A security right in a right to payment of funds credited to a bank account of the depositary bank has priority over a competing security right made effective by any method other than by the secured creditor becoming the account holder.

5. A security right in a right to payment of funds credited to a bank account that is made effective by the secured creditor becoming the account holder has priority over a competing security right that is made effective against third parties by any other method.

6. A depositary bank's right under other law to set off obligations owed to it by the grantor against the grantor's right to payment of funds credited to a bank account maintained with the depositary bank has priority as against a security right in the right to payment of funds credited to the bank account, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

7. A transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor takes free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

8. Paragraph 6 of this article does not adversely affect the rights of transferees of funds from bank accounts under other law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that this article will apply to a priority conflict between a security right in a right to payment of funds credited to a bank account as original collateral and a security right in a right to payment of funds credited to a bank account as proceeds which, according to article 16, paragraph 1 (A/CN.9/WG.VI/WP.61), is automatically effective if the security right in the original collateral is effective against third parties.*]

Article 57. Money

1. A person that obtains possession of money that is subject to a security right takes the money free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of persons in possession of money under other law.

Article 58. Negotiable documents and tangible assets covered

1. A security right in a negotiable document and the tangible assets covered thereby that is made effective against third parties in accordance with chapter III of this Law is subordinate to any superior rights acquired by a transferee of a negotiable document under the law relating to negotiable documents.

2. Subject to paragraph 3 of this article, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by another method.

3. Subject to article 24, paragraph 4, the rule in paragraph 2 of this article does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

(a) The time that the asset became covered by the negotiable document; and

(b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time, such as 30 days, to be specified by the enacting State] from the date of the agreement.

Article 59. Certain licensees of intellectual property

Article 42, paragraph 6, of this Law does not affect the rights of a secured creditor under the law relating to intellectual property.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will refer, with respect to this and the following article, to the discussion of rights of licensees in the* Intellectual Property Supplement *(see paras. 193-212) and explain in particular that the ordinary course of business approach is not drawn from intellectual property law, which does not distinguish in this respect between an exclusive and non-exclusive licence but rather focuses on whether a licence is authorized or not (see* Intellectual Property Supplement, *para. 200)*.]

Article 60. Acquisition security rights in intellectual property

1. The provisions of this Law 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.

2. 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.

[*Note to the Working Group: The Working Group may wish to consider the formulation and placement of this article in the draft Model Law. Paragraph 1 might be included in article 1 on scope (A/CN.9/WG.VI/WP.61) and paragraph 2 might be included in article 2 on definitions*.]

Article 61. Non-intermediated securities

[1. A security right in certificated non-intermediated securities made effective against third parties by endorsement of the certificate in a manner indicating the intention to create and make effective against third parties a security right has priority over a security right in the same securities made effective against third parties by any other method.][13]

2. A security right in certificated non-intermediated securities made effective against third parties by delivery of the certificate to the secured creditor has priority over a security right in the same securities made effective against third parties by registration of a security right notice in accordance with the provisions of chapter IV of this Law.

3. A security right in uncertificated non-intermediated securities made effective against third parties by the conclusion of a control agreement has priority over a security right in the same securities made effective against third parties by registration of a security right notice in accordance with the provisions of chapter IV of this Law.

[13] This rule is to be enacted only by States that have adopted article 1, subparagraph 1 (c).

4. Priority among security rights in uncertificated non-intermediated securities made effective against third parties by the conclusion of control agreements is determined according to the temporal order in which the control agreements were concluded.

5. A security right in uncertificated non-intermediated securities made effective against third parties by a notation of the security right or registration of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities made effective against third parties by any other method.

Option A

6. If encumbered non-intermediated securities are sold or otherwise transferred and a security right in those securities is effective against third parties at the time of the transfer, the buyer or other transferee acquires them subject to the security right.

7. Notwithstanding paragraph 6 of this article, a transferee acquires the encumbered securities free of the security right if:

(a) The secured creditor authorized the sale or other transfer free of the security right; or

(b) At the time of the sale or other transfer, the buyer or other transferee had no knowledge that the sale or other transfer violated the right of the secured creditor under the security agreement.

8. Paragraphs 6 and 7 of this article do not adversely affect the rights of the holders of non-intermediated securities under other law relating to the transfer of securities.

Option B

6. A security right in non-intermediated securities is subordinate to any superior rights acquired by a buyer or other transferee of the securities under other law relating to the transfer of securities.

[*Note to the Working Group: The Working Group may wish to note that: (a) paragraph 6 of option A parallels general rules of the draft Model Law and may thus not be necessary; (b) paragraph 7 of option A parallels the rule applicable to transferees of money and may need to be repeated with respect to transferees of non-intermediated securities; and (c) option B parallels the rule applicable to negotiable documents. The Working Group may also wish to note that, depending on the approach taken with respect to paragraph 1 of this article (i.e. whether para. 1 is retained or deleted and the matter discussed in the Guide to Enactment), the same approach may need to be followed with respect to negotiable instruments and negotiable documents*.]

(A/CN.9/WG.VI/WP.61/Add.2) (Original: English)

Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Rights and obligations of the parties to a security agreement

A. General rules

Article 62. Source of rights and obligations of the parties

Subject to the provisions of this Law, the mutual rights and obligations of the parties to a security agreement are determined by:

(a) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein; and

(b) Any usage to which the parties to the security agreement have agreed and any practices they have established between themselves.

[*Note to the Working Group: The Working Group may wish to note that this article: (a) is based on article 11 of the* United Nations Assignment Convention *(which in turn is based on article 9 of the* CISG*) and recommendation 110 of the* Secured Transactions Guide*; (b) is intended to reiterate the principle that the parties to the security agreement may structure their agreement in any way they wish to meet their particular needs (as is done in articles 6 and 11 of the United Nations Assignment Convention, but not in articles 6 and 9 of the CISG); and (c) is intended to give legislative strength to trade usages agreed upon by the parties and trade practices established between them. The Working Group may also wish to note the*

Guide to Enactment will explain that the principle that a person challenging the effectiveness of the agreement on the ground that is inconsistent with the provisions of this article has the burden of proof.]

Article 63. Obligation of a person in possession to preserve an encumbered asset

A [party to a security agreement] [secured creditor] in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.

[*Note to the Working Group: The Working Group may wish to consider whether the secured creditor only or also the grantor should be obliged to preserve the encumbered asset, depending on whether the secured creditor or the grantor has possession. In any case, this article should not result in preventing the grantor from selling the asset or in making it possible for the grantor to avoid this duty by relinquishing possession. Similarly, how this article would apply would depend on the particular circumstances. For example, if the cost of preserving the encumbered asset exceeds its value, the secured creditor would normally not only relinquish possession but take other steps to address the lack of security. These matters could be addressed in the Guide to Enactment. The Working Group may also wish to consider how the obligation of the secured creditor to take reasonable steps to preserve the encumbered asset would apply in the case of intangible assets. In that connection, the Working Group may wish to consider whether imposing such an obligation on a secured creditor where the encumbered assets are non-intermediated securities runs counter to the right of use of the secured creditor under article 5(1) of the Financial Collateral Directive (same issue in article 64 below)*.]

Article 64. Obligation of a secured creditor to return an encumbered asset or to register a cancellation notice

If the secured obligation has been fully performed and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets, subject to any rights of subrogation in favour of the person performing the secured obligation, the security right is extinguished and the secured creditor must return an encumbered asset in its possession to the grantor, or register a cancellation notice as provided in article 39, paragraph 1, of this Law.

[*Note to the Working Group: The Working Group may wish to consider whether this article or the Guide to Enactment should address the obligation of an assignee to withdraw the notification to the debtor of the receivable. The Working Group may wish to consider whether a new article should be added allowing a secured creditor to return equivalent non-intermediated securities to replace the originally encumbered non-intermediated securities (see art. 5(2) of the Financial Collateral Directive)*.]

Article 65. Rights of a secured creditor with respect to an encumbered asset

1. A secured creditor in possession of an encumbered asset has the right:

(a) To be reimbursed for reasonable expenses incurred for the preservation of the asset in accordance with article 63 of this Law;

(b) To make reasonable use of the asset; and

(c) To apply the monetary proceeds of the asset to the payment of the secured obligation.

2. A secured creditor has the right to inspect an encumbered asset in the possession of the grantor [at all reasonable times] [in a reasonable manner].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in paragraph 2 of this article should be deleted as the obligation of the parties exercise their rights and perform their obligations in good faith and in*

a commercially reasonable manner is already addressed in article 4 dealing with the general standard of conduct (A/CN.9/WG.VI/WP.61).]

B. Asset-specific rules

Article 66. Representations of the grantor

1. [Unless otherwise agreed between the grantor and the secured creditor,] the grantor represents at the time of conclusion of the security agreement that:

(a) The grantor has the right [or the power] to create a security right in the receivable;

(b) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and

(c) The debtor of the receivable does not and will not have any defences or rights of set-off.

2. [Unless otherwise agreed between the grantor and the secured creditor,] the grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in the chapeau of paragraph 1 and in paragraph 2 needs to be retained. In this regard, the Working Group may wish to note that, once all mandatory law provisions are set out in article 3, paragraph 1, all the other provisions of the draft Model Law will be subject to party autonomy, which should render wording along the lines of the bracketed text unnecessary (see also article 67). The Working Group may also wish to consider whether the bracketed text in subparagraph 1 (a) should be retained as, in the case of an assignment in breach of an anti-assignment agreement, formally speaking, the grantor would not have the "right" but only the power to create a security right*.]

Article 67. Right of the grantor or the secured creditor to notify the debtor of the receivable

1. [Unless otherwise agreed between the grantor and the secured creditor,] the grantor or the secured creditor or both may send the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been sent only the secured creditor [and received by the debtor of the receivable] may send a payment instruction.

2. Notification of a security right or of a payment instruction sent in breach of an agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 73 of this Law, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

[*Note to the Working Group: The Working Group may wish to consider the bracketed wording in paragraph 1 of this article, the first of which deals with the right of the parties to agree otherwise and the second deals with the question whether the notification should be only sent by the secured creditor or also received by the debtor of the receivable (this issue arises also in articles 68, 73)*.]

Article 68. Right of the secured creditor to payment

1. As between the grantor and the secured creditor, [unless otherwise agreed and] whether or not notification of the security right has been sent, the secured creditor is entitled:

(a) To retain the proceeds of any payment made to the secured creditor and tangible assets returned to the secured creditor in respect of the encumbered receivable;

(b) To the proceeds of any payment made to the grantor and also to any tangible assets returned to the grantor in respect of the encumbered receivable; and

(c) To the proceeds of any payment made to another person and tangible assets returned to such person in respect of the encumbered receivable, if the right of the secured creditor has priority over the right of that person.

2. The rights of the secured creditor in accordance with paragraph 1 of this article are limited to the value of the secured obligation.

[*Note to the Working Group: The Working Group may wish to note that the commentary will clarify that articles 66-68 are based on recommendations 114-116 of the* Secured Transactions Guide*, which in turn are based articles 12-14 of the* United Nations Assignment Convention*. The changes made are intended to clarify without changing the substance of these articles*.]

Article 69. Right of the secured creditor to preserve the encumbered intellectual property

An agreement between the grantor and the secured creditor that the secured creditor is entitled to take steps to preserve encumbered intellectual property is effective.

[*Note to the Working Group: The Working Group may wish to consider that, while articles 3 (party autonomy) and 63 (obligation to preserve an encumbered asset), may be generally sufficient to ensure that the secured creditor may take steps necessary to preserve encumbered intellectual property, this article is necessary as these rights are normally rights of the intellectual property owner (e.g. to renew a patent registration or pursue infringers)*.]

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 70. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the original contract, without its consent.

2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:

(a) The currency of payment specified in the original contract; or

(b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

Article 71. Notification of the security right in a receivable

1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor and is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if a notification of the security right or a payment instruction is in the language of the original contract between the grantor and the debtor of the receivable.

3. Notification of the security right or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent security right constitutes notification of all prior security rights.

Article 72. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of the security right in a receivable, it is discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of the security right, subject to paragraphs 3-8 of this article, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single security right of the same receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment.

4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received.

5. If the debtor of the receivable receives notification of one or more subsequent security rights, it is discharged by paying in accordance with the notification of the last of such subsequent security rights.

6. If the debtor of the receivable receives notification of the security right in a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this article as if the debtor of the receivable had not received the notification.

7. If the debtor of the receivable receives a notification as provided in paragraph 6 of this article and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

8. If the debtor of the receivable receives notification of the security right from a subsequent secured creditor, it is entitled to request the secured creditor to provide within a reasonable period of time adequate proof that the security right created by the initial grantor to the initial secured creditor and any intermediate security right have been created and, unless the secured creditor does so, the debtor of the receivable is discharged by paying in accordance with this article as if it had not received notification of the security right.

9. Adequate proof of a security right referred to in paragraph 8 of this article includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.

10. This article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Article 73. Defences and rights of set-off of the debtor of the receivable

1. Unless otherwise agreed in accordance with article 74 of this Law, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:

(a) All defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security right had not been created and the claim were made by the grantor; and

(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

2. Notwithstanding paragraph 1 of this article, the debtor of the receivable may not raise as a defence or right of set-off against the grantor breach of an agreement

referred to in article 10, paragraph 2, or article 11, paragraph 5, limiting in any way the grantor's right to create the security right.

Article 74. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3 of this article, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off referred to in article 73 of this Law.

2. The agreement referred to in paragraph 1 of this article may be modified only by an agreement in a writing signed by the debtor of the receivable and its effectiveness as against the secured creditor is subject to article 73, paragraph 2, of this Law.

3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

Article 75. Modification of the original contract

1. An agreement concluded before notification of the security right created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

2. An agreement concluded after notification of the security right created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is ineffective as against the secured creditor unless:

(a) The secured creditor consents to it; or

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

3. Paragraphs 1 and 2 of this article do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.

Article 76. Recovery of payments made by the debtor of the receivable

1. The failure of the grantor to perform the original contract does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

2. Paragraph 1 of this article does not affect any rights that the debtor of the receivable may have against the grantor under other law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 70-76 of the draft Model Law are based on recommendations 117-123 of the* Secured Transactions Guide*, which in turn are based articles 15-21 of the* United Nations Assignment Convention. *Paragraph 2 of article 76 (which is based on recommendation 123 of the* Secured Transactions Guide *and article 21 of the* United Nations Assignment Convention) *has been added to clarify that this article is not intended to deprive the debtor of the receivable of any rights it might have under other law to seek recovery of payments from its contractual partner, that is, the grantor/assignor*.]

B. Negotiable instruments

Article 77. Rights and obligations of the obligor under a negotiable instrument

A secured creditor's rights under a negotiable instrument as against a person obligated on the negotiable instrument are subject to the law relating to negotiable instruments.

[*Note to the Working Group: Depending on the approach taken by the Working Group with respect to the creation* erga omnes *of a security right in a negotiable instrument by endorsement in pledge under the Geneva Uniform Law (i.e. include a reference to that rule in the third-party effectiveness and priority rules on negotiable instruments, non-intermediated securities and perhaps negotiable documents), the Working Group may wish to consider including in this article a rule along the following lines: "This Law does not adversely affect the rights of holders of negotiable instruments under law relating to negotiable instruments."*]

C. Rights to payment of funds credited to a bank account

Article 78. Rights and obligations of the depositary bank

1. The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the bank with which that bank account is maintained without its consent, nor does it obligate the depositary bank to provide any information about that bank account to third parties.

2. Any rights of set-off that the depositary bank may have under other law are not affected by any security right that the bank may have in a right to payment of funds credited to a bank account maintained with the bank.

D. Negotiable documents and tangible assets covered by a negotiable document

Article 79. Rights and obligations of the issuer of a negotiable document

A secured creditor's rights under a negotiable document as against the issuer or any other person obligated on the negotiable document are subject to the law relating to negotiable documents.

E. Non-intermediated securities

Article 80. Rights and obligations of an issuer of a non-intermediated security

A secured creditor's rights under a non-intermediated security as against the issuer are subject to the law relating to non-intermediated securities.

[*Note to the Working Group: The Working Group may wish to consider this article together with option A, paragraph 8, and option B, paragraph 6, of article 61 (A/CN.9/WG.VI/WP.61/Add.1)*.]

Chapter VII. Enforcement of a security right

A. General rules

Article 81. Post-default rights

1. After default, the grantor is entitled to exercise one or more of the following rights:

(a) Pay or otherwise perform in full the secured obligation and obtain a release from the security right of all encumbered assets;

(b) Apply to a court or other authority for relief if the secured creditor is not complying with its obligations under the provisions of this Law;

(c) Propose to the secured creditor, or reject the proposal of the secured creditor, that the secured creditor acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

(d) Exercise any other right provided in the security agreement or any other law.

2. After default, the secured creditor is entitled to exercise one or more of the following rights:

(a) Obtain possession of a tangible encumbered asset;

(b) Sell or otherwise dispose of, lease or license an encumbered asset;

[(c) In the case of a security right in all assets of a grantor, sell or otherwise dispose of the grantor's business as a going concern;]

[(d)] Propose that it acquire an encumbered asset in total or partial satisfaction of the secured obligation;

[(e)] Collect on or otherwise enforce a security right in an encumbered asset that is a receivable, negotiable instrument, right to payment of funds credited to a bank account or intermediated securities;

[(f)] Exercise rights under a negotiable document; and

[(g)] Exercise any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.

3. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.

4. Subject to article 4 of this Law, the exercise of a post-default right with respect to an encumbered asset does not prevent the exercise of a post-default right with respect to the secured obligation, and vice versa.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 139, 141, 143 and 144 of the* Secured Transactions Guide. *The Working Group may also wish to consider subparagraph 2 (c), which introduces a new right of a secured creditor with a security right in all assets of a grantor. This new provision, which appears within square brackets for the consideration of the Working Group, is intended to state explicitly what was implicit in recommendation 132 of the* Secured Transactions Guide *(the thrust of which is included in article 4 of the draft Model Law), namely that, if it is commercially reasonable (e.g. maximizes the value of the grantor's estate), a secured creditor with a security right in all assets of a business may sell the business as a going concern, rather than sell the encumbered assets one by one. The Working Group may wish to note that the Guide to Enactment will clarify that this article deals with the post-default rights applicable to security rights in all types of asset, while the asset-specific section refers to additional post-default rights applicable to security rights in specific types asset, such as receivables (e.g. collection of receivables)*.]

Article 82. Waiver of post-default rights

Subject to article 4 of this Law:

(a) The grantor and any other person that owes payment or other performance of the secured obligation may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter, but only after default; and

(b) The secured creditor may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.

Article 83. Judicial and extrajudicial methods of exercising post-default rights

1. The secured creditor may exercise its post-default rights judicially or extrajudicially.

2. Judicial exercise of the secured creditor's post-default rights is subject to [the civil procedure rules to be specified by the enacting State].

3. Extrajudicial exercise of the secured creditor's post-default rights is subject to articles 4 and 88-91 of this Law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will include wording along the lines of recommendation 138 of the* Secured Transactions Guide *to emphasize the importance of extrajudicial proceedings for the availability and the cost of credit*.]

Article 84. Judicial or other official relief of the grantor for non-compliance by the secured creditor

The debtor, the grantor or any other interested person is entitled to court relief [or other official relief to be specified by the enacting State], including [the enacting State to specify expeditious court proceedings], if the secured creditor fails to comply with its obligations when enforcing the security right judicially or extrajudicially in accordance with article 83 of this Law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that "other official relief to be specified by the enacting State" may include relief by an arbitral tribunal, chamber of commerce or notary public, if there is an agreement to that effect between the grantor and the secured creditor that is enforceable under the law of the enacting State. The Guide to Enactment: (a) will also explain that in such a case the law of the enacting State must provide protection for the rights of persons, who are not party to such an agreement, in the encumbered assets; (b) discuss types of expedited judicial proceeding; and (c) give examples of "interested persons", such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets. In particular with respect to resolution of enforcement-related disputes by arbitration, the Guide to Enactment will also make reference to the need for the law to ensure that third-party creditors are notified (e.g. before an extra-judicial sale takes place under article 88) and given an opportunity to assert their rights (e.g. their right to take over enforcement under article 86 or be paid from the proceeds of a sale according to their priority rank under this law under article 91)*.]

Article 85. Grantor's right of redemption

1. The debtor, the grantor or any other interested person is entitled to redeem the encumbered asset by paying or otherwise performing the secured obligation in full, including payment of interest and the cost of enforcement.

2. This redemption right may be exercised until the asset is sold or otherwise disposed of, leased or licensed, acquired or collected by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

Article 86. Right of higher-ranking secured creditor to take over enforcement

1. Notwithstanding commencement of enforcement by another competing claimant creditor, a secured creditor whose security right has priority as against that of the enforcing creditor is entitled to take over the enforcement process at any time before the asset is sold or otherwise disposed of, leased, licensed, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

2. The right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any method available to a secured creditor under this Law.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article may be deleted, as it seems to be stating that a secured creditor taking over the enforcement process has the same post-default rights that any secured creditor has*.]

Article 87. Secured creditor's right to possession

After default, the secured creditor is entitled to possession of a tangible encumbered asset.

Article 88. Extrajudicial repossession of encumbered assets

[1.] The secured creditor is entitled to obtain possession of a tangible encumbered asset without applying to a court or other authority if all of the following conditions are satisfied:

(a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court or other authority;

(b) The secured creditor has given the grantor and any person in possession of the encumbered asset [or owing payment or other performance of the secured obligation] notice of default and of the secured creditor's intent to obtain possession without applying to a court or other authority within [a short period of time, such as 15 days, to be specified by the enacting State] days after notice is [sent] [received]; and

(c) At the time the secured creditor seeks to obtain possession of the encumbered asset, the grantor or any other person in possession of the encumbered asset does not object.

[2. The notice referred to in subparagraph 1 (b) of this article need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (b) and paragraph 2 of this article (which is intended to reflect the rule in article 90, paragraph 6, according to which no notice is required if the encumbered assets are perishable goods)*.]

Article 89. Extrajudicial disposition of encumbered assets

1. After default, a secured creditor is entitled to sell or otherwise dispose of, lease, or license an encumbered asset without applying to a court or other authority.

2. Subject to article 4, a secured creditor that exercises the right referred to in paragraph 1 of this article may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

Article 90. Advance notice of extrajudicial disposition of encumbered assets

1. After default, the secured creditor must give notice of its intention to sell or otherwise dispose of, lease or licence an encumbered asset in accordance with article 89 of this Law.

2. The notice referred to in paragraph 1 of this article must be given to:

(a) The grantor and any debtor;

(b) Any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time when the enforcing secured creditor took possession of the asset.

3. The notice must be given at least [a short period of time, such as 15 days, to be specified by the enacting State] before extrajudicial disposition takes place and must contain a description of the encumbered assets, a statement of the amount required to

satisfy the secured obligation including interest and the cost of enforcement, a reference to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 85 of this Law and a statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, the time and place of a public disposition, and the manner of the intended disposition.

4. The notice must be in a language that is reasonably expected to inform its recipients about its contents.

5. It is sufficient if the notice to the grantor is in the language of the security agreement.

6. The notice need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.

[*Note to the Working Group: The Working Group may wish to note that no text has been included in this article to reflect recommendation 150 of the* Secured Transactions Guide*, as that recommendation is aspirational and does not fit in model law but could be discussed in the commentary*.]

Article 91. Distribution of proceeds of disposition of encumbered assets

1. In the case of extrajudicial disposition of an encumbered asset:

(a) [Subject to article 45 of this Law,] the enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation;

(b) Except as provided in subparagraph 1 (c) of this article, the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claim, to the extent of the amount of that claim, and remit any balance remaining to the grantor; and

(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.

2. Distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made pursuant to [the civil procedure rules to be specified by the enacting State], but in accordance with the provisions of chapter V of this Law.

3. A debtor remains liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

[4. If the secured creditor violates its obligations under this article and this results in a reduction of the amount of the proceeds, the debtor's liability for any shortfall is reduced by the amount lost.

5. If the secured obligation arises from a transaction entered into by an individual for his or her personal, family or household purposes and the secured creditor violates its obligations under this article.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (a), which raises the issue of payments to preferential creditors that have to be paid ahead of secured creditors. Alternatively, the net proceeds may be defined as proceeds after the payment of any preferential claims or left to the civil procedure rules of the enacting State referred to in paragraph 2. The Working Group may also wish to consider paragraphs 4 and 5 that appear within square brackets*.]

Article 92. Acquisition of encumbered assets in satisfaction of the secured obligation

1. After default, the secured creditor may propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

2. The proposal must be sent to:

(a) The grantor, the debtor and any other person that owes payment or other performance of the secured obligation, including a guarantor;

(b) Any person with rights in the encumbered asset that has notified in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time such as 15 days to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time the secured creditor took possession.

3. The proposal must specify the amount owed as of the date the proposal is sent, including interest and the cost of enforcement, and the amount of the obligation that is proposed to be satisfied by acquiring the encumbered asset, describe the encumbered asset, refer to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84, and state the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor may acquire the encumbered asset as provided in paragraph 1 of this article, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time such as 15 days to be specified by the enacting State] after the proposal is [sent to] [received by] the grantor.

5. In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction, affirmative consent by each addressee of the proposal is necessary.

6. The grantor may make such a proposal and if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5 of this article.

[*Note to the Working Group: The Working Group may wish to note that, a* contrario*, paragraph 5 of this article means that, in the case of full satisfaction of the secured obligation, affirmative consent by each addressee of the proposal is not needed; it is sufficient if each addressee does not object in a timely fashion (see chapter VIII, para. 70 of the* Secured Transactions Guide*). The Working Group may wish to consider this matter and whether it should be addressed in this article explicitly or only discussed in the Guide to Enactment*.]

Article 93. Rights acquired through judicial disposition of encumbered assets

If a secured creditor sells or otherwise disposes of, leases or licences, an encumbered asset through a judicial [or other officially administered] process, the transferee, lessee or licensee acquires the asset [the enacting State to specify whether the transferee, lessee or licensee acquires its rights subject to or free of any rights].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will give examples of other officially administered processes (e.g. before a chamber of commerce or notary public)*.]

Article 94. Rights acquired through extrajudicial disposition of encumbered assets

1. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a court or other authority, a person that acquires the grantor's right in the

asset takes the asset subject to rights that have priority as against the security right of the enforcing secured creditor, but free of rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the enforcing secured creditor.

2. If a secured creditor leases or licenses an encumbered asset without applying to a court or other authority, a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against rights that have priority over the right of the enforcing secured creditor.

3. If the secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in accordance with the provisions of this chapter, a buyer or other transferee, lessee, or licensee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 2 of this article, provided that [it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person and this lack of knowledge was not the result of reckless behaviour].

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in paragraph 3 (which reflects recommendation 163 of the* Secured Transactions Guide*), which is intended to implement the decision of the Working Group that the words "good faith acquirer, lessee or licensee" used in a previous version of paragraph 3 of this article should be replaced by wording that would neither require only knowledge of non-compliance with a rule on enforcement nor go as far as to require collusion between the secured creditor and the acquirer (see A/CN.9/802, para. 31)*.]

B. Asset-specific rules

Article 95. Receivables

1. Subject to articles 70-76 of this Law:

(a) In the case of an outright transfer of a receivable, the transferee has the right to collect or otherwise enforce the receivable;

(b) In the case of a security right in a receivable, the secured creditor has the right to collect or otherwise enforce the receivable after default, or before default with the agreement of the grantor.

2. The right of a transferee or a secured creditor to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that secures payment of the receivable.

3. In the case of collection or other enforcement of a receivable[, subject to article 45 of this Law,] the enforcing secured creditor must:

(a) Apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation; and

(b) Pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claims, to the extent of the amount of that claim, and remit any balance remaining to the grantor.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain the asset-specific post-default rights are applicable to security rights in specific types of asset, while the general post-default rights apply to security rights in all types of asset. The Working Group may also wish to note whether any of the general post-default rights that apply to security rights in tangible assets (e.g. out-of-court repossession of an encumbered tangible asset) should be made applicable to security rights in intangible assets appropriately adjusted. In this regard, the Working Group may wish to note that, unless the conditions are specifically regulated and the grantor's right to due process is specifically protected,*

for example. the out-of-court collection of a receivable may run counter to constitutional guarantees of due process.]

Article 96. Negotiable instruments

1. After default or before default with the agreement of the grantor, [subject to article 77 of this Law,] a secured creditor with a security right in a negotiable instrument has the right to collect or otherwise enforce its right in the negotiable instrument against a person obligated on the instrument.

2. The right of a secured creditor to collect or otherwise enforce a negotiable instrument includes the right to collect or otherwise enforce any personal or property right that secures payment of the instrument.

3. In the case of collection or other enforcement of a negotiable instrument [, subject to article 45 of this Law,] the enforcing secured creditor must:

(a) Apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation; and

(b) Pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claims, to the extent of the amount of that claim, and remit any balance remaining to the grantor.

Article 97. Rights to payment of funds credited to a bank account

1. After default or before default with the agreement of the grantor, [subject to articles 78 of this Law,] a secured creditor with a security right in a right to payment of funds credited to a bank account has the right to collect or otherwise enforce its right to payment of the funds.

2. A secured creditor is entitled to collect or otherwise enforce its security right:

(a) Without having to apply to a court or other authority, if the secured creditor has made its security right effective against third parties by a method other than registration of a notice in accordance with the provisions of chapter IV of this Law;

(b) Only pursuant to a court order, if the secured creditor has made its security right effective against third parties by registration of a notice in accordance with the provisions of chapter IV of this Law, unless the depositary bank agrees otherwise.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that, once inventory is converted to a receivable, a receivable is paid into a bank account, a check is issued on the basis of that account and new inventory is bought, depending on the form of the encumbered asset during the enforcement of the security right, different rules might apply to the enforcement of that security right*.]

Article 98. Negotiable documents and tangible assets covered

After default, or before default with the agreement of the grantor, subject to article 79 of this Law, the secured creditor has the right to enforce a security right in a negotiable document or a tangible asset covered by the document.

[*Note to the Working Group: The Working Group may wish to note that article 94 is based on recommendation 28 of the* Secured Transactions Guide, *article 95 on recommendation 130, article 96 on recommendations 51-53, article 97 on recommendations 108 and 109, and article 98 on recommendation 177*.]

[Article 99. Non-intermediated securities

1. After default or before default with the agreement of the grantor, [subject to article 80,] a secured creditor with a security right in non-intermediated securities has

the right to sell, collect or acquire the encumbered non-intermediated securities in total or partial satisfaction of the secured obligation.

2. A secured creditor is entitled to sell, collect or acquire the encumbered non-intermediated securities:

(a) Without having to apply to a court or other authority, if the secured creditor has made its security right effective against third parties by a method other than registration of a notice in accordance with the provisions of chapter IV of this Law;

(b) Only pursuant to a court order, if the secured creditor has made its security right effective against third parties by registration of a notice in accordance with the provisions of chapter IV of this Law, unless the issuer agrees otherwise.]

[*Note to the Working Group: The Working Group may wish to note that this article is intended to deal with the enforcement of a security right in non-intermediated securities in a way that would be consistent the recommendations of the* Secured Transactions Guide *and national law based on the EU Financial Collateral Directive*.]

(A/CN.9/WG.VI/WP.61/Add.3) (Original: English)
Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws[1]

A. General rules

Article 100. Law applicable to the rights and obligations of the grantor and the secured creditor

The law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will make reference to international texts dealing with the law applicable to contractual rights and obligations, including the Hague Principles on Choice of Law in International Contracts*.]

Article 101. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 4 of this article, the law applicable to the creation, effectiveness against third parties, and priority of a security right in a tangible asset is the law of the State in which the asset is located.

[1] The enacting State may implement the conflict-of-laws provisions as part of the secured transactions law (at the beginning or at the end of it) or as part of a separate law (civil code or other law).

2. The law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset of a type ordinarily used in more than one State is the law of the State in which the grantor is located.

3. If a security right in a tangible asset is subject to registration in a specialized registry or notation on a title certificate providing for registration or notation of a security right, the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State under whose authority the registry is maintained or the title certificate is issued.

4. The law applicable to the priority of a security right in a tangible asset made effective against third parties by possession of a negotiable document as against a competing security right made effective against third parties by another method is the law of the State in which the document is located at the time when the secured creditor obtained possession of the document.

5. A security right in a tangible asset (other than a negotiable instrument) in transit or to be exported from the State in which it is located at the time of the creation of the security right may be created and made effective against third parties under the law of the State of the location of the asset at the time of creation as provided in paragraph 1 of this article, or under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short period of time, such as 30 days, to be specified by the enacting State] after the time of creation of the security right as provided in paragraph 1 of this article.

Article 102. Law applicable to a security right in an intangible asset

[Subject to articles 103-105, subparagraph (b), and 111-115 of this Law,] the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.

Article 103. Law applicable to a security right in receivables arising from a sale, lease or security agreement relating to immovable property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in a receivable arising from a sale, lease or security agreement relating to immovable property is the law of the State in which the grantor is located.

2. Notwithstanding paragraph 1 of this article, the law applicable to a priority conflict involving the right of a competing claimant that is registered in an immovable property registry is the law of the State under whose authority the registry is maintained.

3. The rule in paragraph 2 of this article applies only if, according to the law of the State under whose authority the registry is maintained, registration is relevant to the priority of a security right in the receivable.

Article 104. Law applicable to the enforcement of a security right

The law applicable to issues relating to the enforcement of a security right:

(a) In a tangible asset is the law of the State where enforcement takes place; and

(b) In an intangible asset is the law applicable to the priority of the security right.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that enforcement typically involves several acts, such as a notice of default, notice of extrajudicial repossession and disposition of an encumbered asset, disposition, and distributions of proceeds of disposition (see A/CN.9/802, para. 105*.)]

Article 105. Law applicable to a security right in proceeds

1. The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original encumbered asset from which the proceeds arose.

2. The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in an asset of the same kind as the proceeds.

Article 106. Meaning of "location" of the grantor

1. For the purposes of the provisions of this chapter, the grantor is located in the State in which it has its place of business.

2. If the grantor has a place of business in more than one State, the grantor's place of business is that place where the central administration of the grantor is exercised.

3. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

Article 107. Relevant time for determining location

1. Except as provided in paragraph 2 of this article, references to the location of the assets or of the grantor in the provisions of this chapter refer, for creation issues, to the location at the time of the putative creation of the security right and, for third-party effectiveness and priority issues, to the location at the time the issue arises.

2. If the rights of all competing claimants in an encumbered asset were created and made effective against third parties before a change in location of the asset or the grantor, references in the provisions of this chapter to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change in location.

Article 108. Exclusion of *renvoi*

A reference in the provisions of this chapter to "the law" of another State as the law applicable to an issue refers to the law in force in that State other than its conflict-of-laws provisions.

Article 109. Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law applicable under the provisions of this chapter.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude the application of a provision of the law applicable under the provisions of this chapter if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable under the provisions of this chapter.

5. Paragraphs 1 and 3 of this article do not permit the application of the provisions of the law of the forum to the third-party effectiveness and priority of a security right.

[*Note to the Working Group: The Working Group may wish to note that articles 108 and 109 of the draft Model Law have been revised to be aligned with articles 8 and 11 of the Hague Principles on Choice of Law in International Contracts (see A/CN.9/802, para. 106)*.]

Article 110. Impact of commencement of insolvency proceedings on the law applicable

1. Subject to paragraph 2 of this article, the commencement of insolvency proceedings does not displace the provisions of this chapter.

2. The rule in paragraph 1 of this article is subject to the effects on such issues of the application of the insolvency law of the State in which insolvency proceedings are commenced to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds.

B. Asset-specific rules

Article 111. Law applicable to the relationship of third-party obligors and secured creditors

The law applicable to a receivable, negotiable instrument or negotiable document also is the law applicable to:

(a) The relationship between the debtor of the receivable and the secured creditor, and the relationship between the obligor under a negotiable instrument and the holder of a security right in the instrument;

(b) The conditions under which a security right in a receivable, a negotiable instrument or negotiable document may be invoked against the debtor of the receivable, the obligor under a negotiable instrument or the issuer of a negotiable document, including whether an [anti-assignment agreement] may be asserted by the debtor of the receivable, the obligor or the issuer; and

(c) Whether the obligations of the debtor of the receivable, the obligor under the negotiable instrument or the issuer of the negotiable document have been discharged.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 217 of the* Secured Transactions Guide.]

Article 112. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 113, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as rights and duties of the depositary bank with respect to the security right, is

Alternative A[2]

The law of the State in which the bank with which the account is maintained has its place of business.

2. If the bank has places of business in more than one State, reference should be made to the place where the branch maintaining the account is located.

Alternative B

The law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.

2. The law of the State determined pursuant to paragraph 1 of this article applies only if the depositary bank has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

[2] A State may adopt alternative A or alternative B of this article.

3. If the applicable law is not determined pursuant to paragraph 1 or 2 of this article, the applicable law is to be determined pursuant to [the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary].

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 210 of the* Secured Transactions Guide.]

Article 113. Law applicable to the third-party effectiveness of a security right in specified types of asset by registration

If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a negotiable instrument or a right to payment of funds credited to a bank account, the law of that State is the law applicable to the issue whether third-party effectiveness has been achieved by registration under the laws of that State.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 211 of the* Secured Transactions Guide.]

Article 114. Law applicable to a security right in intellectual property

1. 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.

2. 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.

3. 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.

Article 115. Law applicable to a security right in non-intermediated securities

1. The law applicable to the effectiveness of a security right in certificated non-intermediated securities as against the issuer is the law of the State under which the issuer is constituted.

2. The law applicable to the creation, third-party effectiveness and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located.

3. The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which enforcement takes place.

4. The law applicable to the effectiveness against the issuer, the creation, the effectiveness against third parties, the priority and the enforcement of a security right in uncertificated non-intermediated securities is the law of the State under which the issuer is constituted.

[*Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article may not need to be retained as it deals with the relationship between the holder and the issuer of non-intermediated securities. With respect to certificated non-intermediated securities, the Working Group may wish to note that the Guide to Enactment will clarify that, under article 107, the relevant time for determining the location of the certificate or the issuer, for creation issues, is the time of the putative creation of the security right and, for third-party effectiveness and priority issues, is the time when the issue arises*.]

Article 116. Law applicable in the case of a multi-unit State

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3 of this article, references to the law of a multi-unit State are to the law of

the relevant territorial unit and, to the extent applicable in that unit, to the law of the multi-unit State itself.

2. The relevant territorial unit referred to in paragraph 1 of this article is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If the applicable law is that of a multi-unit State or one of its territorial units, the internal conflict-of-laws provisions in force in the multi-unit State or territorial unit determine whether the substantive provisions of law of the multi-unit State or of a particular territorial unit of the multi-unit State apply.

IX. Transition

Article 117. General

1. This Law comes into force on [a date to be specified by the enacting State] [[…] months after a date to be specified by the enacting State].

2. This Law [repeals] [abrogates] [overrides] [modifies] the […] [laws to be specified by the enacting State].

3. For the purposes of this chapter:

(a) "Prior law" refers to the law of the enacting State that was in force immediately prior to the date on which this Law comes into force; and

(c) "Prior security right" means a right created before the date on which this Law comes into force that is a security right within the scope of this Law and to which this Law would have applied if it had been in force at the time when it was created.

4. This Law applies to all security rights within its scope, including prior security rights, except to the extent that this chapter provides for the continued application of prior law.

Article 118. Actions commenced before the date on which the Law comes into force

Prior law applies to:

(a) Disputes with regard to the post-default rights and obligations of the grantor and the secured creditor that are the subject of court or arbitral tribunal proceedings that were commenced before the date referred to in article 117, paragraph 1, of this Law; and

(b) Disputes with regard to the post-default rights and obligations of the grantor and the secured creditor that are the subject of out-of-court proceedings if [notice of default] [notice of extrajudicial repossession] [notice of extrajudicial sale] [distribution of proceeds] [the step to be specified by the enacting State] has occurred before the date referred to in article 117, paragraph 1, of this Law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that what step exactly (e.g. the submission of a claim) constitutes commencement, in the case of judicial or arbitral proceedings, will be a matter of civil procedure law. The Working Group may wish to consider whether what exactly constitutes commencement in the case of extrajudicial proceedings should be addressed in the draft Model Law or left to each enacting State*.]

Article 119. Creation of a security right

1. Prior law determines whether a security right was created before the date referred to in article 117, paragraph 1, of this Law.

2. A prior security right remains effective between the parties under this Law [notwithstanding that it does not comply with the creation requirements of this Law].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text is necessary*.]

Article 120. Third-party effectiveness of a security right

1. A prior security right that was made effective against third parties before the date referred to in article 117, paragraph 1, of this Law in accordance with prior law continued to be effective against third parties under this Law until the earlier of:

(a) The time it would have ceased to be effective against third parties under prior law; and

(b) The expiration of [a transition period, such as six months, to be specified by the enacting State] after the date on which this Law enters into force.

2. [A security agreement [or other method of creation under the old law to be specified by the enacting State] entered into before the date referred to in article 117, paragraph 1, of this Law is sufficient as authorization for registration after the date referred to in article 117, paragraph 1, of this Law.]

3. If the third-party effectiveness requirements of this Law are satisfied before third-party effectiveness would have ceased in accordance with paragraph 1 of this article, the prior security right continues to be effective against third parties for the purposes of this Law.

4. After the period of time referred to in paragraph 1 of this article, third-party effectiveness of a security right lapses and may be re-established if the third-party effectiveness requirements of this Law are satisfied.

Article 121. Priority of a security right

1. The time to be used for determining priority of a prior security right is the time it was made effective against third parties or, in the case of advance registration, became the subject of a registered notice under the prior law.

2. The priority of a prior security right is determined by prior law if:

(a) The security right and the rights of all competing claimants arose before the date referred to in article 117, paragraph 1, of this Law; and

(b) The priority status of none of these rights has changed since the date referred to in article 117, paragraph 1, of this Law.

3. The priority status of a security right has changed only if:

(a) It was effective against third parties on the date referred to in article 117, paragraph 1, of this Law in accordance with paragraph 1 of article 120 and ceased to be effective against third parties as provided in paragraph 4 of article 120; or

(b) It was not effective against third parties under prior law on the date referred to in article 117, paragraph 1, of this Law and was made effective against third parties under this Law.

Annex I. Regulation[3]

Article 1. Appointment of the registrar

The [the name of the appropriate executive or ministerial authority to be specified by the enacting State] is authorized to appoint and dismiss the registrar, and determine the registrar's duties.

Article 2. Public access

1. To submit a security right notice, a person must:

(a) Use the appropriate notice form prescribed by the [registrar] [Regulation];

(b) Identify itself in the manner prescribed by the registrar; and

(c) Have paid or made arrangements to pay to the satisfaction of the registrar any fee prescribed by the [registrar] [Regulation].

2. To submit a search request to the registry, a person must:

(a) Use the search request form prescribed by the [registrar] [Regulation]; and

(b) Have paid or made arrangements to pay to the satisfaction of the registrar, any fee prescribed by the [registrar] [Regulation].

3. The reason for the rejection of access is communicated by the registrar to the registrant or searcher as soon as practicable.

[*Note to the Working Group: The Working Group may wish to consider whether both alternatives in square brackets in subparagraphs 1 and (a) and (b) of this article may be retained to leave it to each enacting State to determine whether these matters should be left to the registrar or settled in the Regulation. The Working Group may also wish to note that the term "registrar" is used instead of the term "registry" as the latter term is defined as a system and not as a person (the registrar may need to be defined to include the registry staff)*.]

Article 3. Rejection of a security right notice or search request

1. The registration of a security right notice is rejected by the registrar if no information is entered in one or more of the required designated fields or if the information provided is not legible.

2. A search request is rejected by the registrar if no information is entered in at least one of the fields designated for entering a search criterion or if the information is not legible.

3. The reason for the rejection is communicated by the registrar to the registrant or searcher as soon as practicable.

Article 4. No additional conditions to be imposed on access to registry services

1. Information about the registrant's identity is obtained from the registrant and maintained by the registrar in accordance with article 2, subparagraph 1 (b), of this Annex, but verification of that information is not required.

2. Except as provided in article 3 of this Annex, the registrar does not reject the registration or conduct any scrutiny of the content of a notice submitted to the registry for registration.

[*Note to the Working Group: The Working Group may also wish to consider whether in this or other article of the draft Model Law, or in the Guide to Enactment, it should be indicated that, while the date and time of registration is maintained in the public record (see article 31, subpara. 2), the identity of the registrant is maintained in a part of the record of the registry that is not public. The Working*

[3] Depending on its legislative policy and drafting technique, each enacting State may enact registry-related rules in its secured transactions law, a different law or in administrative rules.

Group may also wish to consider whether the identity of the registrant should be maintained in the archives after the notice to which it relates has been cancelled, and thus removed from the public registry record and archived.]

Article 5. Organization of information in registered notices

The registry record is organized so that:

(a) A unique registration number is assigned to a registered initial security right notice and all registered amendment and cancellation security right notices that contain that number are associated with the initial notice in the registry record;

(b) The identifier and address of the person identified as the secured creditor in multiple registered security right notices can be amended by the registration of a single global amendment notice; and

(c) The registration of an amendment or cancellation security right notice does not result in the deletion or modification of information contained in any associated registered notices.

[*Note to the Working Group: The Working Group may wish to consider whether a definition of the term "registration number" should be included in article 2 of the draft Model Law*.]

Article 6. Integrity of information in registered security right notices

1. Except as provided in articles 8 and 9 of this Annex, information contained in registered security right notices may not be amended or removed by the registrar from the registry record.

2. The information contained in registered security right notices is backed up so as to allow reconstruction in the event of loss or damage.

[Article 7. Obligation to send a copy of a registered security right notice

1. A copy of the information in a registered security right notice, indicating the date and time when the registration of the notice became effective and the registration number, is sent by the registrar to the person identified in the notice as the secured creditor at the address set forth in the notice, as soon as practicable after its registration.

2. Within [a short period of time, such as 10 days, to be specified by the enacting State] after the person identified in a registered security right notice as the secured creditor has received a copy of the notice in accordance with paragraph 1 of this article, that person must send a copy of the notice to the person identified therein as the grantor at the address set forth therein, or if that person knows that the address has changed, at the most recent address known to that person or an address reasonably available to that person.]

[*Note to the Working Group: The Working Group may wish to note that, in view of the decision of the Working Group at its 24th session (see A/CN.9/796, para. 87), this article appears within square brackets for further consideration. The Working Group may also wish to consider whether this article should be split in two, one dealing with the obligation of the registrar and the other dealing with the obligation of the secured creditor. The Working Group may also wish to note that paragraph 2 of this article includes changes aimed at simplifying the rule contained in recommendation 18 of the Registry Guide, on which it is based*.]

Article 8. Removal of information from the public registry record and archival

1. Information in a registered security right notice is removed from the public registry record upon the expiry of the period of effectiveness of the notice in accordance with article 32 of this Law or upon registration of a cancellation notice in accordance with article 39 of this Law.

2. Information removed from the public registry record in accordance with paragraph 1 of this article is archived for a period of at least [a long period of time, such as, for example, 20 years, to be specified by the enacting State] in a manner that enables the information to be retrieved by the registry in accordance with article 33 of this Law.

Article 9. Language in which information in a security right notice must be expressed

The information contained in a notice must be expressed in [the language or languages to be specified by the enacting State] and in the character set determined and publicized by the registry.

[*Note to the Working Group: The Working Group may wish to consider whether this article should be retained or deleted and the matter addressed therein discussed in the Guide to Enactment. If the Working Group decides that this article should be retained, it may wish to consider its placement in the draft Model Law (for example, whether it should follow article 8 of this Annex, which provides that a notice that is illegible is rejected). Alternatively, the Working Group may wish to consider whether article 36 of the draft Model Law and/or article 15 of the Annex should provide that where the information in a registered notice is not expressed in the required language or languages the registration of the notice is ineffective or ineffective if it would seriously mislead a reasonable searcher*.]

[Article 10. Correction of errors by the registrar

1. If the registrar makes an error or omission in entering into the registry record the information contained in a paper security right notice or erroneously removes from the registry record all or part of the information contained in a registered security right notice, promptly after discovering the need for the correction or restoration, the registrar must

Option A

register a notice to correct the error or omission, or restore the erroneously removed information and send a copy of the notice to the secured creditor.

Option B

inform the secured creditor identified in the registered notice so as to enable the secured creditor to register a notice to correct the error or omission or restore the erroneously removed information.

2. If a security right notice referred to in paragraph 1 of this article is registered, it is effective

Option A

as of the time it becomes accessible to searchers of the registry record.

Option B

as of the time it becomes accessible to searchers of the registry record, except that the security right to which the notice relates retains the priority it would otherwise have under the Law over the right of a competing claimant that acquired its right prior to the registrar's error or omission or the registrar's erroneous removal of the information.

Option C

as if the error or omission had never been made or the information had never been erroneously removed.

Option D

as if the error or omission had never been made or the information had never been erroneously removed, except that the security right to which the notice relates is subordinate to the right of a competing claimant that would have priority if the notice were treated as effective only from the time of its registration and that acquired its right in reliance on a search of the registry record made before the notice was registered, provided the competing claimant did not have actual knowledge of the error or omission or the erroneous removal of the information at the time it acquired its right.]

[*Note to the Working Group: The Working Group may wish to note that the options set out in this article parallel, with the necessary modifications, the options set out in article 38 of the draft Model Law, dealing with the effectiveness of amendment or cancellation notices not authorized by the secured creditor. Accordingly, the Guide to Enactment will explain that an enacting State should take into account both articles in determining which option to adopt to ensure that the options selected are compatible*.]

[Article 11. Liability of the registrar

Alternative A

Any liability that the registrar may have under other law for loss or damage caused to a person by an error or omission in the administration or operation of the registry is limited to:

(a) An error or omission in a search result issued to a searcher or in a copy of a registered security right notice sent to the secured creditor [up to a maximum amount to be specified by the enacting State]; and

(b) Loss or damage caused by an error or omission on the part of the registrar in entering or failing to enter into the registry record the information contained in a paper security right notice or in erroneously removing all or part of the information contained in a registered security right notice from the registry record [up to a maximum amount to be specified by the enacting State].

Alternative B

The registrar is not liable for loss or damage caused to a person by an error or omission in the administration or operation of the registry.]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) alternative A of this article is intended to leave the issue of the liability of the registrar (or the enacting State) for loss or damage caused by an error or omission in the administration or operation of the registry to other law of the enacting State and, if liability is foreseen by that other law, to limit that liability to the types of errors or omissions listed in alternative A (which may be covered by a compensation fund that the registrar or the enacting State may wish to establish and pay from the registry fees); and (b) alternative B is intended to exclude any liability of the registry (or the enacting State) for errors or omissions in relation to the administration or operation of the registry. The Working Group may further wish to note that alternative A does not contemplate any liability for the alleged failure of the registry system to properly or completely enter information directly submitted by a registrant electronically since it would be impossible to prove that this was due to the fault of the system as opposed to the registrant's own error or omission but that the secured creditor is still protected since the registrar is obligated to send a copy of the registered notice to the secured creditor who can then verify the accuracy and completeness of the information. Finally, the enacting State may also wish to address liability for false or misleading information provided by the registrar or registry staff to registrants or searchers*.]

Article 12. Determination of grantor identifier

1. Where the grantor is a natural person:

(a) [Subject to subparagraph 1(c) of this article, the] [The] identifier of the grantor is the name of the grantor, as it appears in [the official documents on the basis of which the grantor's name should be determined and the hierarchy among those official documents, to be specified by the enacting State];

(b) [The enacting State should specify the various components of the grantor's name that must be entered in the prescribed registry notice form and provide the designated fields for each component in the notice]; and

(c) [The enacting State should address the possibility that the name of the grantor as it appears in the relevant document or source specified in subparagraph 1(a) of this article may have been changed in accordance with applicable change of name law and whether, in this eventuality, it should specify that the new name of the grantor should be entered.]

2. Where the grantor is a legal person, the grantor identifier is the name of the grantor that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

3. [The enacting State should specify whether additional information must be entered in the designated field of the prescribed registry notice form in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 13. Determination of secured creditor identifier

1. Where the secured creditor is a natural person, the secured creditor identifier is the name of the secured creditor as it appears in [the official documents on the basis of which the grantor's name should be determined and the hierarchy among those official documents, to be specified by the enacting State].

2. Where the secured creditor is a legal person, the secured creditor identifier is the name of the secured creditor that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

3. [The enacting State should specify whether additional information must be entered in the designated field of the prescribed registry notice form in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 14. Sufficient description of encumbered assets

1. A generic description that refers to all of the grantor's movable assets within a generic category includes all of the grantor's present and future assets within that category.

2. A generic description that refers to all of the grantor's movable assets includes all of the grantor's present and future movable assets.

Article 15. Impact of errors in required information

1. The secured creditor is responsible for ensuring that the information in a security right notice is set forth in the correct designated field in the notice and that the information is accurate and complete, and conforms to the requirements of the Law and the Regulation.

2. An incorrect statement of the grantor identifier in a security right notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.

3. Except as provided in paragraph 4 of this article, an incorrect or insufficient statement of the information required in a security right notice other than the grantor's

identifier does not render the registration of the notice ineffective unless the error would seriously mislead a reasonable searcher.

[4. An incorrect statement in a security right notice with respect to the period of effectiveness of registration[4] or the maximum amount for which the security right may be enforced,[5] does not render the notice ineffective[, except to the extent it seriously misled third parties that relied on the information set out on the notice].]

5. An incorrect statement of the grantor identifier in a security right notice does not render the registration of the notice ineffective with respect to other grantors correctly identified in the notice.

6. An insufficient description of an encumbered asset in a security right notice does not render the registration of the notice ineffective with respect to other encumbered assets sufficiently described.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text at the end of paragraph 4 (which comes from rec. 29, subpara. (c) of the* Registry Guide*, which in turn comes from rec. 66 of the* Secured Transactions Guide*) should be retained. Whether the period of effectiveness or maximum amount indicated in the notice is greater or lower than it was actually intended, the notice is effective and third parties relying on the notice as it appears on the registry record are protected (this point may be clarified in the Guide to Enactment or in para. 4 of this article). In this respect, the Working Group may wish to note that the Guide to Enactment will explain that: (a) the reference to a reasonable searcher in paragraph 3 means that the "seriously misleading test" in this paragraph is objective (that is, it is not necessary for a competing claimant to establish that it was actually misled as a result of the error in order for an error that would be seriously misleading from the perspective of a reasonable searcher to render a registration ineffective); and (b) the reference in paragraph 4 to parties that actually relied to their detriment on an erroneously stated registration period or maximum amount in a registered notice means that the "seriously misleading test" in this paragraph is subjective (that is, a third party challenging the notice needs to establish that it was actually misled as a result of the error; see* Secured Transactions Guide*, chap. IV, paras. 84 and 96)*.]

Article 16. Secured creditor's authorization

In the case of a change in the secured creditor identified in a registered initial security right notice, the new secured creditor may register an amendment or cancellation security right notice relating to the initial notice at any time after the change.

Article 17. Information required in an amendment security right notice

1. An amendment security right notice must contain the following items of information in the designated field for each item:

(a) The unique registration number assigned by the registry to the initial notice to which the amendment relates; and

(b) The information to be added, deleted or changed, as the case may be.

2. An amendment notice may relate to one or more than one item of information in a notice.

[4] This provision will be necessary, if the enacting State implements option B or C of article 32.
[5] This provision will be necessary, if the enacting State implements article 34, subparagraph (e).

Article 18. Global amendment of secured creditor information

Option A

A person may register a single global amendment security right notice to amend its identifier and address in all registered security right notices in which it is identified as the secured creditor.

Option B

A person may request the registrar to register a single global amendment security right notice to amend its identifier and address in all registered security right notices in which it is identified as the secured creditor.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, if an enacting State adopts the first option stated in this article, it will need to establish special access procedures to enable a person to identify all notices in which it is named as the secured creditor and to register a global amendment notice, since the identifier of the secured creditor is not a search criterion generally available to the public for searching the public registry record*.]

Article 19. Information required in a cancellation security right notice

A cancellation security right notice must contain in the designated field the unique registration number assigned by the registry to the initial notice to which the cancellation relates.

Article 20. Compulsory registration of an amendment or cancellation security right notice

1. In a case falling within subparagraphs 1(b) to (d) of article 39 of this Law, the secured creditor may charge the grantor any fee agreed between them for registering an amendment or cancellation security right notice.

2. Notwithstanding paragraph 1 of this article, no fee or expense may be charged or accepted by the secured creditor for complying with a written request from the grantor sent in accordance with paragraph 2 of article 39 of this Law.

Article 21. Search criteria

A search of the public registry record may be conducted according to:

(a) The identifier of the grantor; or

(b) The registration number assigned to the registered security right notice.

Article 22. Search results

Option A

1. A search result that indicates the date and time when the search was performed and either lists any registered security right notices that contain information that matches the search criterion provided by the searcher exactly and sets forth the registration history and all the information contained in these notices, or indicates that no registered notice contains information that exactly matches the search criterion provided by the searcher.

Option B

1. A search result that indicates the date and time when the search was performed and either lists any registered security right notices that contain information that matches the search criterion provided by the searcher exactly and closely, and sets forth the registration history and all the information contained in these notices, or indicates that no registered notice contains information that exactly or closely matches the search criterion provided by the searcher.

2. An official search certificate indicating the search result may be issued by the registrar at the request of the searcher.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 3 of this article should apply only to searches against the grantor identifier and not the registration number if the enacting State implements a close-match system. There does not seem to be a commercial or practical reason for close matches with respect to registration numbers. The Working Group may also wish to note that the Guide to Enactment will explain that if an enacting State chooses to implement the type of close match system contemplated by alternative B, the rules used by the registry for determining what constitutes a close match should be specified and publicized*.]

Article 23. Fees for the services of the registry

Option A

1. The following fees are payable for the services of the registry:

(a) Registration of a security right notice:

(i) Paper: […];

(ii) Electronic: […];

(b) Searches:

(i) Paper: […];

(ii) Electronic: […];

(c) Certificates:

(i) Paper: […];

(ii) Electronic: […];

2. The registry may enter into an agreement with a person to establish a registry user account to facilitate the payment of fees.

Option B

The [administrative authority to be specified by the enacting State] may determine the fees and methods of payment for the services of the registry by decree.

Option C

The following services of the registry are free of charge [types of service to be specified by the enacting State.]

C. Report of Working Group VI (Security Interests) on the work of its twenty-seventh session (New York, 20-24 April 2015)

(A/CN.9/836)

[Original: English]

Contents

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the "draft Model Law"), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).[1] At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide"), the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[2]

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group had a general exchange of views on the basis of a note prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.55 and Add.1 to 4).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.
[2] Ibid.

important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.[3] After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012 (see para. 1 above).[4] The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[5]

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11). At its twenty-fifth session (New York, 31 March-4 April 2014), the Working Group continued its work based on a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57/Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/802, para. 11). The Working Group also decided to recommend to the Commission that the draft Model Law address security rights in non-intermediated securities along the lines agreed upon by the Working Group at that session (see A/CN.9/802, para. 93).

5. At its forty-seventh session (New York, 7-18 July 2014), the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities, and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.[6]

6. At its twenty-sixth session (Vienna, 8-12 December 2014), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/830, para. 12).

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its twenty-seventh session in New York from 20 to 24 April 2015. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Belarus, Brazil, Cameroon, Canada, China, Ecuador, France, Gabon, India, Israel, Italy, Japan, Kenya, Malaysia, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda and United States of America.

8. The session was attended by observers from the following States: Ethiopia, Haiti, Libya, Romania and Trinidad and Tobago. The session was also attended by observers from the Holy Sea and the European Union.

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

(a) *United Nations system*: World Bank and World Intellectual Property Organization (WIPO);

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Asociación Americana de Derecho Internacional Privado (ASADIP), Commercial Finance Association (CFA), European Federation

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 193.
[4] Ibid., para. 194.
[5] Ibid., para. 332.
[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

for Factoring and Commercial Finance (EUF), European Law Students' Association (ELSA), Factors Chain International (FCI), International Factors Group (IFG), International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Centre for Inter-American Free Trade (NLCIFT) and New York City Bar (NYCBAR).

10. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Mr. Hiroo SONO (Japan)

11. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.62 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.63 and Add.1-4 (Draft Model Law on Secured Transactions).

12. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Model Law on Secured Transactions.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.63/Add.1, 2 and 4). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law to reflect the deliberations and decisions of the Working Group.

IV. Draft Model Law on Secured Transactions

A. Chapter VI. Rights and obligations of the parties and third-party obligors (A/CN.9/WG.VI/WP.63/Add.2)

Article 61. Source of rights and obligations of the parties

14. Differing views were expressed as to whether article 61 should be retained or deleted. One view was that it should be deleted as it dealt with matters that were typically addressed in contract law and, in any case, could be discussed in the draft Guide to Enactment. Another view was that article 61 should be retained, in particular, to give legislative strength to usages agreed upon by the parties and trade practices established between them that might not be generally recognized in all jurisdictions. After discussion, the Working Group decided that article 61 should be retained.

15. The Working Group next turned to the formulation of article 61. A number of suggestions were made. One suggestion was that the secured transactions law based on the draft Model Law should be added to the list of sources of the mutual rights and obligations of the parties in article 61. It was noted, however, that only chapter VI, section I of the draft Model Law dealt with the contractual rights and obligations of the parties to a security agreement. It was also noted that for those rights it would be more appropriate to refer to contractual law. Another suggestion was that subparagraph 1(b) should make it clear that agreements with respect to trade usages did not need to be explicit but could also be implicit (see art. 9(2) CISG). It was noted, however, that that did not need to be addressed in the draft Model Law, as it was a typical matter of contract law, which the Secured Transactions Guide did not

address. Yet another suggestion was that subparagraph 1(b) should refer to the right of the parties to agree otherwise. It was noted, however, that, by not listing article 61 as a mandatory law rule, article 4 was sufficient in providing that parties could agree otherwise. After discussion, the Working Group agreed that, while the formulation of article 61 could be improved, all those matters could usefully be discussed in the draft Guide to Enactment. Subject to those changes, the Working Group approved the substance of article 61.

Article 62. Obligation of a person in possession to preserve an encumbered asset

16. With respect to article 62, the Working Group agreed that: (a) the obligation to preserve an encumbered asset should be placed on both the grantor and the secured creditor in possession; (b) reference should be made to the obligation of the person in possession to "exercise reasonable care" rather than to "take reasonable steps"; and (c) the reference to the preservation of "the asset and its value" should be revised to take into account the meaning of this wording in the Secured Transactions Guide and in particular that, in many cases, the preservation of the asset would also result in the preservation of its value. Subject to those changes, the Working Group approved the substance of article 62.

17. With respect to the question whether the obligation in article 62 should also be placed on third parties in possession, it was agreed that it did not need to be addressed in article 62 but could be discussed in the draft Guide to Enactment as: (a) such an obligation could be placed on third parties only with their consent; and (b) if a third party agreed, such an agreement would be enforceable under contractual law.

18. With respect to certificated non-intermediated securities, it was agreed that the draft Guide to Enactment should explain that the obligation to preserve their value could be challenging for the person in possession, since that person might not be in control of their value, which may fluctuate according to market conditions. In addition, the Guide to Enactment should clarify that a rule of securities law along the lines of article 5(1) of the Financial Collateral Directive giving a secured creditor a right to use certificated non-intermediated securities and the rule in article 62 should be read together and their relationship would be a matter for domestic rules of interpretation.

Article 63. Obligation of a secured creditor to return an encumbered asset or to register a cancellation notice

19. The Working Group noted that article 63 dealt with the following three different issues: (a) the extinction of a security right upon full satisfaction of all secured obligations; (b) the obligation of the secured creditor to return the encumbered asset upon extinction of the security right by full satisfaction of all secured obligations or otherwise (e.g. by the statute of limitations); and (c) the obligation of the secured creditor to register a cancellation notice upon extinction of a security right, which was also addressed in article 39, subparagraph 1(d).

20. Despite some initial doubt, the Working Group agreed that, while the extinction of a security right upon full satisfaction of all secured obligations was a matter that should be addressed in the draft Model Law, the extinction of the secured obligation was a contractual matter that should be left to contractual law. As to the placement of the provision that would deal with the extinction of a security right upon full satisfaction of all secured obligations, the Working Group agreed that, as it was not a matter relating to the rights and obligations of the parties to the security agreement but rather to the termination of a security right, it should be placed at the end of chapter II (creation) within square brackets for further consideration by the Working Group.

21. With regard to the obligation of the secured creditor to return the encumbered asset upon extinction of the security right by full satisfaction of all secured obligations or otherwise, the Working Group agreed that it should be addressed in article 63 with wording that would be more in line with article 39, subparagraph 1(d), of the draft

Model Law and recommendation 112 of the Secured Transactions Guide (the encumbered asset should not necessarily be returned to the grantor as the parties might have agreed otherwise).

22. With regard to the obligation of the secured creditor to register a cancellation notice upon extinction of a security right by full satisfaction of all secured obligations or otherwise, it was agreed that the relevant wording should be retained in article 63 within square brackets for further consideration of the question whether the issue should be addressed only in article 63, only in article 39, subparagraph 1(d) or in both articles.

23. Subject to the above-mentioned changes, the Working Group approved the substance of article 63 and the new article to be placed at the end of chapter II (creation).

24. The Working Group also agreed that the Guide to Enactment should clarify that: (a) article 63 did not need to address the obligation of an assignee to withdraw the notification to the debtor of the receivable as the obligation of the secured creditor to return any surplus was sufficient to address that matter (see arts. 67, para. 2, and 90, 1(c)); (b) article 63 was not relevant to outright transfers of receivables as the term "secured obligation" did not apply to outright transfers of receivables (see art. 2, subpara. (ee)), and receivables could not be subject to actual (physical) possession (see art. 2, subpara. (z)); and (c) whether the secured creditor could return equivalent non-intermediated securities (see art. 5(2) of the Financial Collateral Directive) was a matter left to securities law.

Article 64. Rights of a secured creditor with respect to an encumbered asset

25. With respect to article 64, it was agreed that subparagraph 1(a) should be aligned with article 62 to refer to the preservation of not only the "asset" but also of "its value" (see para. 16 above). It was also suggested that subparagraphs 1(b) and 1(c) should be aligned with recommendation 113, subparagraph (b), of the Secured Transactions Guide, which combined the two elements and made reference to "revenues generated", rather than to "monetary proceeds". In that connection, a note of caution was struck, as: (a) unlike the term "proceeds" (see art. 2, subpara. (bb)), the term "revenues" was not a defined term; and (b) the term "revenues" could be understood in a broad sense (to include, for example, revenues generated through sales of goods produced using encumbered machinery).

26. It was also agreed that both sets of bracketed text in paragraph 2 should be deleted as the obligation of the parties to exercise their rights and perform their obligations in good faith and in a commercially reasonable manner was already addressed in article 5 (general standards of conduct). While a suggestion was made that the word "reasonable" in subparagraph 1(b) could also be deleted for the same reason, it was widely felt that there was a need to retain that word which qualified the manner in which the asset was to be used.

27. Subject to the above-mentioned changes, the Working Group approved the substance of article 64.

Article 65. Representations of the grantor

28. With respect to article 65, the Working Group agreed that, unlike recommendation 114 of the Secured Transactions Guide on which it was based, it should apply to all types of receivables, since representations of the kind addressed in article 65 could be given with respect to any type of receivable, whether contractual or not. With respect to subparagraphs 1(a) and 1(b), it was suggested that, as they set out rules applicable to all types of asset, they should be either moved to the general rules or deleted and the matters addressed therein left to contractual law. While there was support for the deletion of subparagraph 1(a), there was no sufficient support for the deletion of subparagraph 1(b) as it reflected a type of representation that was particularly important for receivables financing transactions. After discussion, the Working Group agreed to delete subparagraph 1(a) but retain the remaining part of

article 65. The Working Group also agreed that the Guide to Enactment should explain that the deletion of subparagraph 1(a) was not a policy change but rather an effort to avoid giving the impression that the representation in subparagraph 1(a) was not relevant for types of asset other than receivables and to defer in that regard to contractual law. Subject to those changes, the Working Group approved the substance of article 65.

Article 66. Right of the grantor or the secured creditor to notify the debtor of the receivable

29. The Working Group agreed that article 66 and other articles in the draft Model Law should reflect the general rule that receipt by the debtor of the receivable would be required for a notification to be effective. As a matter of drafting, it was thus suggested that reference should be made to the notification being "received by" or "given to" the debtor of the receivable. The Working Group also agreed that paragraph 2 should be revised to clarify what was the agreement to which it referred (see rec. 115 of the Secured Transactions Guide). Subject to those changes, the Working Group approved the substance of article 66.

Article 67. Right of the secured creditor to payment

30. It was suggested that the heading of article 67 should make it clear that the article dealt only with receivables. Subject to that change and the changes necessary to reflect the receipt rule (see para. 29 above), the Working Group approved the substance of article 67.

Article 68. Right of the secured creditor to preserve encumbered intellectual property

31. The Working Group approved the substance of article 68 unchanged.

Article 69. Protection of the debtor of the receivable

32. The Working Group approved the substance of article 69 unchanged.

Article 70. Notification of the security right in a receivable

33. The Working Group agreed that article 70 should be revised to avoid restating the receipt rule set out in article 66 (see para. 29 above). Subject to that change, the Working Group approved the substance of article 70.

Article 71. Discharge of the debtor of the receivable by payment

34. The Working Group approved the substance of article 71 unchanged.

Article 72. Defences and rights of set-off of the debtor of the receivable

35. The Working Group agreed that subparagraph 1(a) should be revised to make it clear that it applied only to contractual receivables. Subject to that change, the Working Group approved the substance of article 72.

Article 73. Agreement not to raise defences or rights of set-off

36. The Working Group agreed that the bracketed text in paragraph 2 should be retained outside square brackets to conform article 73 more closely to recommendation 121, subparagraph (c), of the Secured Transactions Guide. As a matter of drafting, it was suggested that that result might be better achieved by language along the following lines: "the agreement … may be modified only by an agreement in a writing signed by the debtor of the receivable in accordance with article 74, paragraph 2" or "the agreement … may be modified only by an agreement in a writing signed by the debtor of the receivable and its effectiveness against the secured creditor is determined by article 74, paragraph 2". Subject to that change, the Working Group approved the substance of article 73.

Article 74. Modification of the original contract

37. The Working Group approved the substance of article 74 unchanged.

Article 75. Recovery of payments made by the debtor of the receivable

38. The Working Group agreed that article 75, paragraph 1, should clarify that, where a receivable was transferred from the original creditor to another person and a security right was created by that transferee, it would apply in the case of failure of the transferor (rather than the grantor) to perform the contract giving rise to the receivable. The Working Group also agreed that paragraph 2 should be deleted as it was unnecessary (paragraph 1 did not affect the rights of the debtor of the receivable against the grantor) and was not included in recommendation 123 of the Secured Transactions Guide, on which article 75 was based. Subject to those changes, the Working Group adopted the substance of article 75.

Article 76. Rights as against the obligor under a negotiable instrument

39. With respect to article 76, it was agreed that the words "subject to" should be replaced with words along the lines of "determined by", to clarify the policy of the draft Model Law to defer in that regard to other law. It was agreed that the same change should be made to articles 78, 79 and where appropriate in the draft Model Law. Subject to that change, the Working Group adopted the substance of article 76.

Article 77. Rights and obligations of the depositary bank

40. The Working Group approved the substance of article 77 unchanged.

Article 78. Rights as against the issuer of a negotiable document

41. Subject to the change agreed upon in the context of the discussion of article 76 (see para. 39 above), the Working Group adopted the substance of article 78.

Article 79. Rights as against the issuer of a non-intermediated security

42. Subject to the change agreed upon in the context of the discussion of article 76 (see para. 39 above), the Working Group approved the substance of article 79.

B. Chapter VII. Enforcement of a security right (A/CN.9/WG.VI/WP.63/Add.2)

Article 80. Post-default rights

43. It was noted that article 80 set out a catalogue of the rights of the grantor and the secured creditor in the case of default, which, with the exception of the rights in subparagraphs 1(d) and 2(e), and paragraphs 2 and 3, were then reflected in other provisions of chapter VII. Differing views were expressed as to whether such a catalogue should be retained. One view was that it should be retained, as it was helpful to the reader, but, for that purpose, it should be revised to be more complete and accurate. The prevailing view, however, was that such a catalogue should be deleted. It was stated that, while appropriate for a legislative guide, such a catalogue did not belong in a model law. It was also observed that duplication was unnecessary and could even be harmful, as it was likely to result in inconsistencies and confusion. After discussion, the Working Group agreed that article 80 should be revised to refer only to the rights in in subparagraphs 1(d) and 2(e), and the rules in paragraphs 3 and 4.

44. The Working Group next considered the question whether some of the grantor's remedies set out in paragraph 1 should be available to the grantor even before default and be dealt with in chapter VI, Section I, of the draft Model Law. The Working Group agreed that, for example, the right of redemption and the right to apply to a court or other authority for relief should indeed be available to the grantor even before default. However, in line with its approach to set out some basic provisions with regard to the pre-default contractual rights of the parties, the Working Group agreed

that those rights should be left to the relevant contractual law, and the matter usefully explained in the draft Guide to Enactment.

45. The Working Group then turned to the question whether, in the case of a security right in all assets of a grantor, the secured creditor could dispose of the business as a going concern. It was agreed that, depending on what was commercially reasonable, the secured creditor should be able to decide whether to dispose of the encumbered assets individually, in groups or as a whole. It was also agreed that the sale of the encumbered assets as a whole might have the effect of a sale of a business as a going concern, but it did not really amount to a sale of a business as a going concern as the business was not an encumbered asset. It was further agreed that, in any case, that terminology should be avoided as it could create confusion and interfere with insolvency and receivership law. It was suggested that the matter might be addressed in article 88, paragraph 2, or discussed in the draft Guide to Enactment.

46. Subject to the aforementioned changes, the Working Group approved the substance of article 80.

Article 81. Waiver of post-default rights

47. The Working Group agreed that article 81 should clarify that the default referred to in paragraph 1 meant the default on the secured obligation, whether it was owed by the grantor or any other party. As a matter of drafting, it was suggested that it would be sufficient to clarify the matter in the first article dealing with enforcement. The Working Group also agreed that paragraph 2 should be deleted, as its substance was already captured by article 4 on party autonomy. It was also suggested that article 81 could be merged with article 80. Subject to those changes, the Working Group approved the substance of article 81.

Article 82. Judicial and extrajudicial methods of exercising post-default rights

48. The Working Group first considered a suggestion that alternative dispute resolution ("ADR") mechanisms, such as conciliation and arbitration, should be listed as methods for exercising post-default rights in article 82. In support of that suggestion, it was stated that, by referring only to judicial and extrajudicial proceedings, rather than to exercising those rights by applying or without applying to court or other authority, as did recommendation 142 of the Secured Transactions Guide, article 82 appeared to preclude ADR as a method of enforcement of post-default rights. In addition, it was observed that the fact that only the note to article 83, which dealt with judicial or other official relief by the grantor for non-compliance by the secured creditor, made reference to ADR reinforced the impression that ADR was not available as a method for exercising post-default rights under article 82. Moreover, it was pointed out that, in line with the Secured Transactions Guide, the draft Model Law made reference in the context of its chapter on transition to the fact that disputes with regard to post-default rights of the parties could be resolved by way of judicial or arbitral proceedings (see rec. 229 and art. 113, subpara. (a)). It was also mentioned that the resolution of such disputes by ADR was generally recognized in international instruments, such as the World Bank Toolkit on Secured Transactions and the OAS Model Law on Secured Transactions, as well as in secured transactions laws recently enacted in Latin America.

49. While there was agreement in the Working Group as to the importance of ADR methods, doubt was expressed as to whether the draft Model Law should specifically refer to ADR in the context of enforcement. It was stated that there was nothing in articles 82 or 83 that precluded parties from agreeing to resolve a dispute arising in the context of the exercise of a post-default right by an ADR method. In addition, it was observed that the draft Model Law should not attempt to address the potentially complex issues arising in the context of the exercise of post-default rights, such as repossession and disposition of encumbered assets. Moreover, it was pointed out that the disputes that could arise in the context of article 82 were not of the same magnitude as the disputes that could arise in the context of article 83, as the former could involve the rights of third parties, while the latter would typically involve a

bilateral dispute between the grantor and the secured creditor. It was also noted that consideration of the matter would require coordination with other working groups, such as Working Group II (Arbitration and Conciliation), a matter that would have to be addressed by the Commission.

50. After discussion, the Working Group agreed that the matter should be considered at a future session on the basis of a detailed proposal.

51. With respect to article 82, the Working Group agreed that it should be aligned more closely with recommendation 142 of the Secured Transactions Guide to refer to the right of the secured creditor to exercise its post-default rights with or without applying to a court or other authority. In addition, it was agreed that the reference to "court or other authority" should be within square brackets followed by the words "to be specified by the enacting State", thus leaving it to each enacting State to determine the relevant court or other authority (e.g. a chamber of commerce). Moreover, it was agreed that, in paragraph 2, reference should be made to "the rules to be specified by the enacting State" as those rules might not necessarily be civil procedure rules (e.g. administrative rules with respect to proceedings before an authority other than a court). It was further agreed that, in paragraph 3: (a) the reference to article 5 should be deleted, as the general standard of conduct applied to the exercise of any right under the draft Model Law, including the right to exercise post-default rights without applying to a court or other authority (but not the right to apply to a court or other authority, which was typically enshrined in procedural and constitutional law rules); and (b) the reference to articles 87-90 should be replaced by a reference to the "provisions of this chapter", as the secured creditor could exercise post-default rights without having to apply to a court or other authority on the basis other provisions of chapter VII (e.g. article 91 dealing with the acquisition of the encumbered asset in total or partial satisfaction of the secured obligation).

52. In that connection, the suggestion was made that article 82 should be revised to state that the post-default rights that the secured creditor could exercise by applying to a court or other authority were limited to the right to obtain possession and the right to dispose of the encumbered asset. It was stated that all other post-default rights (including acquisition of an encumbered asset in total or partial satisfaction of the secured obligation and collection) could not be exercised before a court or other authority. That suggestion was objected to. It was stated that, in some jurisdictions, collection of a receivable or under a negotiable instrument might require a court order. In addition, it was observed that there might be other post-default rights that could be exercised before a court or other authority (e.g. appointment of a receiver). Moreover, it was pointed out that, even if a post-default right could only be exercised without an application to a court or other authority, there was no reason to preclude the grantor or the secured creditor from seeking the assistance of a court or other authority to resolve a dispute that might arise with respect to the exercise of that post-default right. It was also mentioned that, in any case, the draft Model Law should not attempt to harmonize national enforcement rules and thus potentially become less acceptable to States. After discussion, it was agreed that, while some post-default rights could be exercised only without an application to a court or other authority, the draft Model Law should not limit the ability of the parties to avail themselves of the assistance of a court or other authority to exercise a post-default right or resolve disputes arising in that respect.

53. Subject to the above-mentioned changes, the Working Group approved the substance of article 82.

Article 83. Judicial or other official relief of the grantor for non-compliance by the secured creditor

54. Recalling its decision with respect to article 82 (see para. 51 above), the Working Group agreed that article 83 should be revised to refer to the exercise of post-default rights without an application to a court or other authority. In addition, it was agreed that article 83 should be revised to more closely reflect recommendations 137 and 138 of the Secured Transactions Guide and provide the possibility for all

parties to obtain relief, including relief by way of expedited proceedings before a court or other authority. Moreover, it was agreed that the term "any other interested person", which was said to be vague and inappropriate for a legislative text, should be retained within square brackets along with the term "competing claimant", which was defined in the draft Model Law (see art. 2, subpara. (e)) for further consideration by the Working Group. It was also agreed that reference should be made to the enforcement of a security right "in accordance with the provisions of this chapter" (and not only article 82). It was further agreed that the Guide to Enactment should: (a) include a discussion of relief offered by an arbitral tribunal or conciliator along the lines of the discussion in the note to the Working Group following article 83; and (b) clarify that a violation of the secured creditor's obligations, included violations by the secured creditor's agents, employees or service providers. Subject to those changes, the Working Group approved the substance of article 83.

Article 84. Grantor's right of redemption

55. With respect to article 84 and its heading, the Working Group agreed that neutral terminology should be used, as the term "redemption" was used in some jurisdictions and only with respect to loans secured by mortgages. As a matter of drafting, the suggestion was made that reference could instead be made to the grantor's right to terminate the enforcement process (for the extinction of the security right by full payment of all secured obligations, see para. 20 above).

56. With respect to paragraph 1, the Working Group agreed that reference should be made to the "reasonable" cost of enforcement. In that connection, it was agreed that the draft Guide to Enactment should clarify that: (a) in the case of enforcement before a court or other authority, the court or other authority would set the cost of enforcement based on evidence; and (b) in the case of enforcement without an application to a court or other authority, the grantor could seek the assistance of a court or other authority if it were to disputer the reasonableness of the cost of enforcement.

57. With respect to paragraph 2, the Working Group agreed that it should clarify that it referred to a "post-default" agreement of the secured creditor to dispose of the encumbered asset. It was also agreed that language should be included in paragraph 2 within square brackets to ensure that, even after the encumbered asset was leased or licensed, the grantor could pay the secured obligation and obtain the encumbered asset free of the security right, subject to the rights of the lessee or licensee.

58. Subject to the above-mentioned changes, the Working Group approved the substance of article 84.

Article 85. Right of higher-ranking secured creditor to take over enforcement

59. With respect to article 85, the Working Group agreed that it should be aligned more closely with recommendation 145 of the Secured Transactions Guide to refer to the right of a higher-ranking secured creditor to take over enforcement initiated by another secured creditor or a judgement creditor. It was also agreed that paragraph 2 should be retained to reflect the right of the higher-ranking secured creditor to continue the enforcement proceedings initiated by another creditor or terminate them and initiate new proceedings. In that connection, it was agreed that the draft Guide to Enactment should clarify that, in determining whether to continue or terminate the enforcement proceedings, the secured creditor should: (a) have the right, for example, to correct mistakes of the enforcing creditor; and (b) be obliged to act in a commercially reasonable manner, for example, to avoid unnecessary enforcement costs. Subject to those changes, the Working Group approved the substance of article 85.

Article 86. Secured creditor's right to possession

60. At the outset, the Working Group agreed that article 86 should apply to all types of tangible asset referred to in the definition contained in article 2, subparagraph (kk), of the draft Model Law. It was also agreed that article 86 should be revised to provide

that, after default, the secured creditor was entitled to obtain possession of an encumbered asset by applying to a court or other authority or in accordance with article 87. It was also agreed that the draft Guide to Enactment should clarify that the mere fact that the grantor had defaulted on the secured obligation did not give to the secured creditor a right to obtain possession of the asset from a person that obtained its rights in the asset free of the security right (e.g. a lessee or licensee).

61. Differing views were expressed as to whether a lower-ranking secured creditor should be entitled to obtain possession of an encumbered asset from a higher-ranking secured creditor. One view was that the lower-ranking secured creditor should have that right. Otherwise, it was stated, a higher-ranking secured creditor in possession without an interest to enforce its security right could delay or preclude enforcement. Another view was that the lower-ranking secured creditor should not have the right to obtain possession of the encumbered asset from the higher-ranking secured creditor. It was stated that, if the higher-ranking secured creditor relinquished possession, its security right might cease to be effective against third parties and lose its priority status. It was also observed that, if the encumbered asset was disposed of by the lower-ranking secured creditor, it could diminish in value. After discussion, the Working Group requested the Secretariat to prepare options for consideration by the Working Group at a future session.

62. Subject to the above-mentioned changes, the Working Group approved the substance of article 86.

Article 87. Extrajudicial repossession of encumbered assets

63. Recalling its decision with respect to article 66 (see para. 29 above), the Working Group agreed that article 87 should be revised to reflect the receipt rule.

64. With respect to subparagraph 1(b), the Working Group agreed that the first bracketed text (which mirrored the definition of the term “debtor” in art. 2, subpara. (h) of the draft Model Law) should be deleted, as it was sufficient for the secured creditor to give notice of default to the grantor and any person in possession of the encumbered asset. It was also agreed that no example should be given of a short period of time within which notice should be given, as the length of a “short notice” could differ from State to State.

65. With respect to subparagraph 1(c), the Working Group agreed that the words “at the time the secured creditor seeks to obtain possession” should be revised to clearly refer to the time when the secured creditor attempted to obtain actual (physical) possession of the encumbered asset and not when the secured creditor “declared its intent” to that effect, which was a matter already dealt with in subparagraph 1(b).

66. With respect to paragraph 2, the Working Group agreed that it should be retained outside square brackets to refer to instances where the value of the encumbered asset was likely to diminish quickly and, therefore, no notice would be required of the secured creditor. In that connection, it was also agreed that the reference to encumbered assets being of a kind sold on the recognized market should be deleted, as it was too broad and could thus include any type of asset.

67. Subject to those changes, the Working Group approved the substance of article 87.

Article 88. Extrajudicial disposition of encumbered assets

68. Recalling its decision to delete article 80, subparagraphs 2(b) and 2(c) (see, para. 43 above), the Working Group agreed that article 88 should be revised to provide that, in the case of a security right in all assets of the grantor, the secured creditor would be free to decide whether to dispose of the encumbered assets individually, in groups or as a whole, as long as it acted in a commercially reasonable manner (see para. 45 above). In that connection, it was agreed that the reference in paragraph 2 to article 5 was unnecessary and should be deleted, as it was understood that article 5 was a general standard that applied to the entire draft Model Law. It was also agreed that the draft Guide to Enactment should highlight the flexibility provided to the secured

creditor in disposing of the encumbered assets by public or private sale, and if by public sale, through auction or tender. Subject to those changes, the Working Group approved the substance of article 88.

Article 89. Advance notice of extrajudicial disposition of encumbered assets

69. Recalling its decision with respect to article 66 (see para. 29 above), the Working Group agreed that article 89 should be revised to reflect the receipt rule. Also recalling its decision with respect to article 87 (see para. 64 above), the Working Group agreed that no example should be given of a short period of time within which notice should be given. Also recalling its decision with respect to article 83, the Working Group agreed that the term "any person with rights in the encumbered asset" should be placed within square brackets along with the term "competing claimant" for the Working Group to consider the matter at a future session.

70. With respect to paragraph 1, it was agreed that it should be revised to clarify that the secured creditor had to give notice to the grantor if, after default, the secured creditor had decided to dispose of the encumbered asset without applying to a court or other authority. However, a suggestion to clarify that matter further by merging article 89 with article 88 did not receive sufficient support.

71. With respect to paragraph 3, it was agreed that reference should be made to "a reasonable estimate of the cost of enforcement" as it would be impossible for the secured creditor to come up with an accurate cost of enforcement at the time when it would give notice. It was further agreed that the content of recommendation 150 of the Secured Transactions Guide, which was relevant to article 89, should be discussed in the draft Guide to Enactment.

72. Subject to the above-mentioned changes, the Working Group approved the substance of article 89.

Article 90. Distribution of proceeds of disposition of encumbered assets

73. At the outset, the Working Group agreed that article 90 should not apply to outright transfers of receivables (see art. 1, para. 2, of the draft Model Law). In addition, it was agreed that the words "in accordance with generally applicable procedural rules" in subparagraph 1(c) should be deleted, as other law would apply anyway. Moreover, it was agreed that no new article should be included in the draft Model Law to deal with damages for non-compliance with enforcement obligations along the lines of recommendation of 136 of the Secured Transactions Guide, as that was a matter for other law. It was agreed, however, that the matter could be discussed in the draft Guide to Enactment, in particular in relation to consumer transactions. Subject to those changes, the Working Group approved the substance of article 90.

Article 91. Acquisition of encumbered assets in satisfaction of the secured obligation

74. With respect to article 91, the Working Group agreed that: (a) the words "and any other person that owes payment or other performance of the secured obligation, including a guarantor" in subparagraph 2(a) should be deleted, as the term "debtor" was sufficient to encompass that person; (b) the article should be revised to reflect the receipt rule and use neutral terminology, rather than refer to redemption (see, para. 29 and para. 55 above); (c) paragraphs 4 and 5 should state the rule that the secured creditor should be deemed to have acquired the encumbered asset (in para. 4, unless one of the addressees of the notice objects and in para. 5, if each addressee gave its affirmative consent within the relevant time period). Subject to those changes, the Working Group approved the substance of article 91.

Article 92. Rights acquired through judicial disposition of encumbered assets

75. Recalling its earlier decision with respect to article 82 (see, para. 51 above), the Working Group agreed that reference should be made to disposition before a court or other authority. It was also agreed that article 92 should be revised to deal in one

paragraph with the question whether a buyer or other transferee of an encumbered asset in the context of enforcement of a security right would take the asset free of any rights of the grantor and any competing claimant and in another paragraph with the same question with regard to lessees and licencees of an encumbered asset. In that connection, it was agreed that the latter paragraph should read along the lines of article 93, paragraph 2. Subject to those changes, the Working Group approved the substance of article 92.

Article 93. Rights acquired through extrajudicial disposition of encumbered assets

76. With respect to paragraph 1, the Working Group agreed that it should be revised to provide explicitly that the transferee of encumbered assets in an out-of-court (or other authority) disposition acquired the grantor's right in the encumbered asset free of the rights of the secured creditor and any competing claimant with a lower-ranking right, but subject to the rights that have priority over the security right of the enforcing secured creditor. With respect to paragraph 3, it was agreed that reference should be made in that regard to knowledge of a violation that materially prejudiced the rights of the grantor (within square brackets), but was not necessarily the result of reckless behaviour. Subject to those changes, the Working Group approved the substance of article 93.

Article 94. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security

77. The Working Group noted that the word "also" in paragraph 1 was intended to ensure that the secured creditor could collect a receivable under article 94 but also, for example, sell it under article 88. It was stated, however, that that word could inadvertently give the impression that not only the secured creditor but also the grantor were entitled to collect the receivable. Thus, the Working Group agreed to delete the word "also" in paragraph 1.

78. With respect to outright transfers of receivables, the Working Group agreed that: (a) article 1, paragraph 2, should be revised to provide that articles 80-93, but also 94, did not apply to outright transfers of receivables; and (b) a new article should be prepared to deal with that matter. In that connection, it was agreed that, in line with recommendation 167 of the Secured Transactions Guide, the new article should provide that: (a) the secured creditor (transferee) was entitled to collect the receivable whether the grantor (transferor) had defaulted or not; and (b) the standard of good faith and commercial reasonableness (art. 5) did not apply to an outright transfer without recourse as the grantor (transferor) had no remaining vested interest in the receivable that could be protected by a limitation on the way in which the secured creditor (transferee) could collect the receivable.

79. The Working Group noted that, unless specifically regulated and the grantor's right to due process sufficiently protected, out-of-court collection might run counter to constitutional guarantees of due process. However, the Working Group agreed that the conditions for the secured creditor to obtain possession without applying to a court or other authority did not apply to the out-of-court collection of a receivable. It was stated that, for example, advance notice was required when the secured creditor wanted to obtain possession of an encumbered asset without applying to a court or other authority to avoid a breach of peace and to ensure that a disposition would produce good value, matters that would not arise in the case of out-of-court collection of receivables. In addition, it was observed that, if the secured creditor (transferee), acting in a commercially unreasonable manner, collected less than what was owed from the debtor of the receivable, the grantor (transferor) would be protected and the secured creditor (transferee) would be liable for damages. Moreover, it was pointed out that that approach was consistent with the Assignment Convention and the Secured Transactions Guide.

80. Subject to the above-mentioned changes, the Working Group approved the substance of article 94.

C. Chapter IV. Registration of a notice with respect to a security right (A/CN.9/WG.VI/WP.63/Add.1)

81. To reflect the content of chapter IV more accurately, the Working Group agreed that its heading should be revised to read along the following lines: “Registry system”.

Article 26. Establishment of the general security rights registry

82. With respect to article 26, the Working Group agreed that the registry should be established by the secured transactions law, so that the enactment of the law and the establishment of the registry would be coordinated. It was widely felt that that would not necessarily result in undue delays as the effective date of the law would be deferred to a time when a State would be prepared to set up the registry. Subject to that change, the Working Group approved the substance of article 26.

Article 27. Public access to registry services

83. The Working Group agreed that paragraph 1 should be deleted, as paragraph 2 was sufficient to state the principle of public access to registry services. Subject to that change, the Working Group approved the substance of article 27.

Article 28. Grantor’s authorization for registration

84. At the outset, the Working Group noted that, while grantor authorization was required for a registration to be effective, it could be given before or after registration and its existence did not need to be evidenced for registration to take place. It was agreed that: (a) subparagraph 2(d) should be deleted and guidance on any other amendment notices that required the grantor’s authorization should be provided in the draft Guide to Enactment (e.g. an amendment notice to extend the duration of the registered notice); (b) paragraph 3 should be clarified and thus refer directly to the registration of an amendment notice that added a grantor, which had to be authorized by the additional grantor; (c) paragraph 4 should also be clarified and thus refer to a transferee of encumbered assets that took its rights subject to the security right; (d) paragraph 6 should refer to evidence of authorization for the registration to occur (rather than for the registrar to “accept” a registration at its discretion); and (e) new rules should be added to the priority chapter to address the priority issues relating to the registration of an amendment notice that added encumbered assets or increased the maximum amount for which the security right might be enforced. Subject to those changes, the Working Group approved the substance of article 28.

Article 29. A notice may relate to more than one security right

85. The Working Group agreed that, to avoid inadvertently creating the impression that a notice ought to identify a security right, article 29 should be revised to provide that a single notice was “sufficient to make effective against third parties” one or more than one security right. Subject to that change, the Working Group approved the substance of article 29.

Article 30. Time when a notice may be registered

86. The Working Group agreed that the words at the end of article 30 (“provided that registration is authorized by the grantor in accordance with article 28”) were unnecessary as the matter was already covered in article 28 and should thus be deleted. Subject to that change, the Working Group approved the substance of article 30.

Article 31. Time of effectiveness of a registered notice

87. With respect to paragraphs 2, 3 and 5 of article 31, it was agreed that they should be revised to make it clear that the functions referred to therein had to be performed by the registry. Subject to that change, the Working Group approved the substance of article 31.

Article 32. Period of effectiveness of a registered notice

88. It was noted that article 3 of the Annex should clarify that, if an amendment notice was not registered within the time period provided in paragraph 2 of options A and C, the amendment notice would be rejected. After discussion, the Working Group approved the substance of article 32 unchanged.

Article 33. Organization of information in registered notices

89. The Working Group approved the substance of article 33 unchanged.

Article 34. Information required in an initial notice

90. The Working Group agreed that the draft Guide to Enactment should refer to the discussion of serial number registration and unique numbers as grantor identifiers in the Secured Transactions Guide and the Registry Guide. After discussion, the Working Group approved the substance of article 34.

Article 35. Impact of a change of the grantor's identifier

91. Recalling its earlier decision with respect to articles 87 and 89 (see paras. 64 and 89 above), the Working Group agreed that examples as to the length of the time periods foreseen in that and other articles should be moved to the Guide to Enactment. In that connection, it was observed that the draft Guide to Enactment should make it clear that how short or long a period might need to be would depend on the nature of the issue and the local circumstances. It was also agreed that paragraph 1 should be revised to refer to the security right retaining "whatever priority it had before the change was made". Subject to those changes, the Working Group approved the substance of article 35.

Article 36. Impact of errors in required information

92. The Working Group approved the substance of article 36 unchanged.

Article 37. Impact of a transfer of an encumbered asset

93. With respect to article 37, the Working Group agreed that: (a) subparagraph 2(a) of options A and B should be revised to refer to a security right created by a transferee (rather than a competing security right); (b) the reference to the secured creditor's knowledge of the transfer should be moved from paragraph 2 to paragraph 1 of option B; (c) reference should be made in the draft Guide to Enactment to the discussion in the Secured Transactions Guide of the options contained in article 37; and (d) the draft Guide to Enactment should discuss the impact of the adoption of option A, B or C of article 37 on article 40. Subject to those changes, the Working Group approved the substance of article 37.

Article 38. Secured creditor's authorization

94. The Working Group agreed that the heading of article 38 should read along the following lines: "Secured creditor's authorization for registration of an amendment or cancellation notice". It was also agreed that all options should be revised to reflect the discussion in the Registry Guide better (see paras. 249-259). It was also agreed that article 38 should be coordinated with article 16 of the Annex to deal with the situation in which upon assignment of the secured obligation (and with it the security right), only the assignee (new secured creditor) would be able to register an amendment or cancellation notice. Subject to those changes, the Working Group approved the substance of article 38.

Article 39. Compulsory registration of an amendment or cancellation notice

95. While some support was expressed in favour of retaining the words "as soon as practicable" in paragraph 1, the Working Group agreed that they should be deleted. It was widely felt that those words were not necessary as, under paragraphs 2 and 3, the grantor was entitled to request the secured creditor to register an amendment or

cancellation notice or to apply for that purpose to a judicial or administrative authority at any time. It was also stated that, in any case, the requirement for the grantor to act in good faith and in a commercially reasonable manner was sufficient to oblige the secured creditor to act as soon as practicable. The Working Group also agreed that paragraph 2 should be retained outside square brackets. Subject to those changes, the Working Group approved the substance of article 39.

Article 40. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

96. The Working Group approved the substance of article 40 unchanged.

D. Annex I. Regulation (A/CN.9/WG.VI/WP.63/Add.4)

Article 1. Appointment of the registrar

97. While some doubt was expressed as to whether an executive or ministerial authority would determine the registrar's duties (rather than the Regulation), the Working Group approved the substance of article 1 of the Annex unchanged with the understanding that that authority would do so through the Regulation.

Article 2. Public access

98. With respect to article 2 of the Annex, it was agreed that: (a) the heading should be revised to read along the following lines: "access to registry services"; (b) the chapeau of paragraph 1 should be revised to read along the following lines: "to the registry"; (c) the words "to the satisfaction of the registrar" in subparagraphs 1(c) and 2(b) should be deleted as they introduced a subjective element; and (d) reference should be made throughout article 2 to the "Regulation" rather than to the "registry" to ensure that those matters were settled by an executive or ministerial authority in the Regulation rather than by the registry staff in an arbitrary way. Subject to those changes, the Working Group approved the substance of article 2 of the Annex.

Article 3. Rejection of a security right notice or search request

99. The Working Group agreed that references to a registration or a search request being rejected by the "registrar" should be deleted, since they implied a paper-based registry and endowed a subjective power on the registrar to accept or reject a registration or a search request. Acknowledging that most modern registry systems would be electronic and that registration would be automatic, the Working Group also agreed that the term "registry" (rather than the term "registrar") should be used throughout the draft Model Law and the definition of that term in the Registry Guide should be included in the draft Model Law. It was further agreed that the term "registrar" would only be mentioned in article 1 of the Annex and thus it did not need to be defined in the draft Model Law. Subject to those changes, the Working Group approved the substance of article 3 of the Annex.

Article 4. No additional conditions to be imposed on access to registry services

100. The Working Group approved the substance of article 4 of the Annex unchanged.

Article 5. Organization of information in registered notices

101. With respect to article 5 of the Annex, it was agreed that subparagraph (b) should be deleted as it dealt with a matter already addressed in article 18 of the Annex. Subject to those changes, the Working Group approved the substance of article 5 of the Annex.

Article 6. Integrity of information in registered security right notices

102. The Working Group approved the substance of article 6 of the Annex unchanged.

Article 7. Obligation to send a copy of a registered security right notice

103. With respect to article 7 of the Annex, it was agreed that: (a) wording should be added within square brackets to reflect the rule in the second sentence of recommendation 55, subparagraph (c) of the Secured Transactions Guide; (b) the words "as soon as practicable" throughout chapter IV of the draft Model Law (e.g. art. 38, para. 5) and the Annex (e.g. arts. 2, 3 and 7) should be replaced with words along the following lines: "immediately", "without delay" or "forthwith". Subject to those changes, the Working Group approved the substance of article 7 of the Annex.

Article 8. Removal of information from the public registry record and archival

104. The Working Group approved the substance of article 8 of the Annex unchanged.

Article 9. Language in which information in a security right notice must be expressed

105. The Working Group approved the substance of article 9 of the Annex unchanged.

Article 10. Correction of errors by the registrar

106. With respect to article 10 of the Annex, it was agreed that it should be aligned more closely with article 38 of the draft Model Law, as revised, and retained within square brackets. Subject to those changes, the Working Group approved the substance of article 10 of the Annex.

Article 11. Liability of the registrar

107. With respect to article 11 of the Annex, it was agreed that it should be revised to address the concerns expressed and to present additional options (e.g. liability limited up to an amount to be specified by the enacting State). Subject to those changes, the Working Group approved the substance of article 11 of the Annex.

Article 12. Determination of grantor identifier

108. With respect to article 12 of the Annex, it was agreed that: (a) the bracketed text in subparagraph 1(a) should be retained outside square brackets; and (b) subparagraph (c) should be aligned more closely with recommendation 24, subparagraph (d) of the Registry Guide. Subject to those changes, the Working Group approved the substance of article 12 of the Annex.

Article 13. Determination of secured creditor identifier

109. The Working Group approved the substance of article 13 of the Annex unchanged.

Article 14. Sufficient description of encumbered assets

110. The Working Group approved the substance of article 14 of the Annex unchanged.

Article 15. Impact of errors in required information

111. With respect to article 15 of the Annex, it was agreed that: (a) paragraph 1 should be deleted as it only provided guidance on matters addressed in other provisions; (b) paragraphs. 2 and 3 should be deleted as they were covered in article 36 of the draft Model Law or the material in article 36 of the draft Model Law and article 15 of the Annex should be placed in one article; and (c) the text within

square brackets in paragraph 4 should be retained outside square brackets, while paragraph 4 as a whole should be retained within square brackets. Subject to those changes, the Working Group approved the substance of article 15 of the Annex.

Article 16. Secured creditor's authorization

112. With respect to article 16 of the Annex, it was agreed that it should be merged or aligned with article 38 of the draft Model Law. Subject to those changes, the Working Group approved the substance of article 16 of the Annex.

Article 17. Information required in an amendment security right notice

113. The Working Group approved the substance of article 17 of the Annex unchanged.

Article 18. Global amendment of secured creditor information

114. The Working Group approved the substance of article 18 of the Annex unchanged.

Article 19. Information required in a cancellation security right notice

115. The Working Group approved the substance of article 19 of the Annex unchanged.

Article 20. Compulsory registration of an amendment or cancellation security right notice

116. The Working Group approved the substance of article 20 unchanged.

Article 21. Search criteria

117. The Working Group approved the substance of article 21 unchanged.

Article 22. Search results

118. With respect to article 22 of the Annex, it was agreed that it should be revised to present an additional option under which there would no distinction between a printed search and a search certificate. Subject to those changes, the Working Group approved the substance of article 22 of the Annex.

Article 23. Fees for the services of the registry

119. With respect to article 23 of the Annex, it was agreed that option C or the Guide to Enactment should set out examples of services for which no fee should be charged, such as a restoration of an erroneously cancelled registration (art. 10 of the Annex) or the migration of information from one registry under prior law to another under the new law. Subject to that change, the Working Group approved the substance of article 23 of the Annex.

V. Future work

120. The Working Group considered a proposal that the provisions in chapter IV of the draft Model Law and the Annex should be presented as one whole. It was stated that the inclusion of registry-related provisions in an annex might inadvertently imply that they were less important or did not belong in a law. In addition, it was observed that the division of the registry-related provisions between the draft Model Law and the Annex might result in duplication, gaps or inconsistencies and, in any case, made it more difficult for States to understand and implement. Moreover, it was pointed out that, if the current division of the registry-related provisions was to be maintained, at least the criteria for that division should be explained in the Guide to Enactment to avoid any negative implication and provide guidance to States as to how to implement them. There was broad support in the Working Group for that proposal. It was further

stated that it was important to present the registry-related provisions as model legislative rules, leaving it to each State to determine the exact manner of their implementation (e.g. in the secured transactions law, another law, a Regulation or a combination thereof). After discussion, the Working Group agreed that the registration-related provisions in the draft Model Law and the Annex should be reflected all together as a whole in the Annex, while chapter IV could be reduced to a provision stating that a registry was established and enacting States should implement the registry-related provisions in the Annex.

121. The Working Group next considered the question whether to recommend to the Commission the preparation of a guide to enactment of the draft Model Law. The Working Group noted that, in preparing the draft Model Law, it was mindful of the fact that the draft Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering the draft Model Law for enactment. In addition, the Working Group noted that, in the preparation of the draft Model Law, it had assumed that the draft Model Law would be accompanied by such a guide and referred a number of matters for clarification in that guide. Moreover, the Working Group noted that the draft Model Law would be used in a number of States with limited familiarity with the types of secured transaction considered in the draft Model Law and thus, the draft Guide to Enactment, much of which will be drawn from the travaux préparatoires of the draft Model Law, would also be helpful to other users of the text, such as judges, arbitrators, practitioners and academics. The Working Group also noted that the draft Guide to Enactment would briefly explain the thrust of each provision or section of the draft Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions. It was also noted that, in order to avoid duplication, the draft Guide to Enactment would include extensive cross-references to those texts and in particular the Secured Transactions Guide and the Registry Guide. After discussion, the Working Group decided to recommend to the Commission that it assign to the Working Group the task of preparing a draft Guide to Enactment of the draft Model Law.

122. The Working Group then turned to discuss the planning of its future work with a view to ensuring that it would be able to submit the draft Model Law and the draft Guide to Enactment to the Commission for final consideration and adoption at its forty-ninth session in 2016. It was agreed that the draft Model Law was a comprehensive text and the work of the Working Group and the Commission would be greatly facilitated if a part of the draft Model Law that was sufficiently mature and distinct could be submitted to the Commission for approval in principle at its upcoming forty-eighth session, which was scheduled to take place in Vienna from 29 June to 16 July 2015. It was also agreed that the registry-related provisions that reflected the policy decisions made by the Commission when it adopted the Registry Guide in 2013 could be submitted to the Commission for approval in principle, as they were sufficiently mature and formed a distinct part of the draft Model Law. It was also agreed that the drafting of those provisions could be finalized by the Working Group at a later stage. It was further agreed that the chapters of the draft Model law on transition and conflict of laws were equally mature and distinct and could thus also be submitted to the Commission for approval in principle. After discussion, the Working Group decided to submit to the Commission the registry-related provisions in the draft Model Law and the Annex, as well as the chapters on transition and conflict of laws, for approval in principle at its upcoming forty-eighth session.

123. The Working Group noted that its next session was scheduled to take place in Vienna from 12 to 16 October 2015, those dates being subject to confirmation by the Commission at its upcoming forty-eighth session.

D. Note by the Secretariat on a Draft Model Law on Secured Transactions (A/CN.9/WG.VI/WP.63 and Add.1-4)

[Original: English]

Contents

Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. This Law applies to security rights in movable assets.

2. With the exception of articles 80-93, this Law applies to outright transfers of receivables.

3. Notwithstanding paragraph 1, this Law does not apply to security rights in:

(a) The right to request payment under or to receive the proceeds of an independent undertaking;

(b) Intellectual property in so far as this Law is inconsistent with [the enacting State to specify its law relating to intellectual property];[1]

(c) Intermediated securities;

(d) Payment rights arising under or from financial contracts governed by [close-out] netting agreements, except a payment right arising upon the termination of all outstanding transactions;

(e) Payment rights arising under or from foreign exchange transactions; and

(f) [The enacting State to set out other types of asset it wishes to exclude, such as those that are subject to specialized secured transactions and asset-based registration regimes under other law to the extent that that other law governs matters addressed in this Law].[2]

[4. This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset that is outside the scope of this Law to the extent that [the enacting State to specify any other law] applies to security rights in those types of asset and governs the matters addressed in this Law.]

5. [Nothing in this Law affects the application of] [This Law is subject to] laws relating to the protection of parties to transactions made for personal, family or household purposes.

6. [Nothing in this Law overrides a provision of any other law that limits the creation or enforcement of a security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in or the transferability of an asset on the sole ground that it is a future asset, or a part or undivided interest in an asset].

[*Note to the Working Group: The Working Group may wish to consider whether certain types of outright transfers of receivables that are often excluded from the scope of secured transactions laws in several jurisdictions should also be excluded from the scope of the draft Model Law or at least discussed in the Guide to Enactment. In this regard the Working Group may wish to consider the following possible exclusions: (a) Outright transfers of receivables as part of a sale of a business out of which they arose, unless the seller remains in apparent control of the business after the sale: the reason for this exclusion is that the potential that the transferor will be able to mislead other buyers of the receivables is very limited unless the old owner remains in apparent control of the business. Whether this exclusion is necessary will depend on whether the Working Group considers that a transfer of receivables incidental to the sale of all the assets of a business may be interpreted as a transfer of receivables subject to the draft Model Law. (b) Outright transfers of receivables made solely to facilitate the collection of the receivables for the transferor: the reason for this exclusion is that the transferee in this type of transaction effectively acts as an agent of the transferor and not as an independent transferee capable of asserting*

[1] This provision may not be necessary if the enacting State has coordinated, or has otherwise addressed the relationship between this Law and any secured transactions provisions of its law relating to intellectual property.

[2] If the enacting State decides to introduce any other exception(s), they should be limited and set out in the Law in a clear and specific way.

priority over another transferee, a result that may follow from the general rules of agency in the enacting State. (c) Outright transfers of a single receivable (or negotiable instrument) made in whole or in partial satisfaction of a pre-existing indebtedness: the reason for this exclusion is that a transferee might not think of having to register such a transaction or otherwise conform to the provisions of the draft Model Law. On the other hand, this exclusion could undermine the certainty and transparency sought to be achieved through otherwise incorporating the outright transfer of even a single receivable within the registration and priority rules of the draft Model Law. (d) Outright transfers of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract: the reason for this exclusion is that the transferee takes the place of the transferor and thus there is no risk of deception of third parties as to who is entitled to receive payment. On the other hand, this type of transaction would seem to involve a novation of the contract and not a simple transfer of a right to payment and therefore would fall within the scope of the draft Model Law in any event. (e) Outright transfer of present or future wages, salary, pay, commission, or any other compensation for labour or personal services of an employee: the reason for this exclusion is that such transfers are typically prohibited by other law. Thus, if they are excluded, they should be excluded only to the extent they are actually prohibited by other law of the enacting State. However, their exclusion may not be necessary as the draft Model Law preserves legal prohibitions to the transferability of or the creation of a security right in an asset under other law in any event (see art. 1, para. 5). (f) Outright transfers for the general benefit of creditors of the transferor: in many common law jurisdictions, an assignment for the general benefit of creditors operates as an alternative to formal insolvency proceedings or as a device for commencing voluntary insolvency proceedings. Thus, the Guide to Enactment may need to state that enacting States that follow this approach may need to clarify that the draft Model Law does not apply to such transfers. (g) Outright transfers of a right to damages in tort: the reason for this exclusion is that the transfer of tort claims is often prohibited by law, as these claims are personal or because of concerns that their use as security for credit may increase tort actions and insurance costs or interfere with the rights of the victims of torts. In this regard, it should be noted, that, unlike the United Nations Convention on the Assignment of Receivables in International Trade *(the "*Assignment Convention*") that applies only to contractual receivables, the draft Model Law applies to all types of receivables, including a prospective award of damages in a tort claim, a right to payment under a settlement contract pertaining to a tort claim and to proceeds of a damages claim that are deposited into a bank account. Accordingly, such an exclusion may be left to each enacting State rather than included in the Model Law. (h) Outright transfers of an interest in or claim under a contact of insurance: the reason for this exclusion is that such transactions may be adequately covered by existing law of the enacting State. However, such an exclusion could have a negative impact on the availability of credit on the basis of insurance policy proceeds and would run counter to the policy of the* Secured Transactions Guide*, which defines "proceeds" as to include insurance policy proceeds. With respect to subparagraph 3(d), the Working Group may wish to note that, unlike recommendation 4, subparagraph (d), of the* Secured Transactions Guide *which refers to "netting", subparagraph 3(d) refers to "close-out netting". The Working Group may wish to note that the Guide to Enactment will explain that this change of wording is necessary to ensure that transactions relating to set off even between two sellers of goods with trade claims and counter-claims would not be inadvertently excluded (see A/CN.9/830, para. 20). With respect to subparagraph 3(e), the Working Group may wish to consider whether the exclusion of payment rights arising under or from financial contracts governed by [close-out] netting agreements in subparagraph 3(d) is sufficient to cover also payment rights arising under or from foreign exchange transactions addressed in subparagraph 3(e) and, if so, whether subparagraph 3(e) should be deleted. The Working Group may wish to consider subparagraphs 3(d) and (e) together with the definitions of the terms "financial contract" and "[close-out] netting" in article 2, which are based on the definitions of those terms contained in article 5 of the* Assignment Convention. *With respect to paragraph 6, the Working Group may wish to consider the bracketed wording, which is intended to ensure that*

statutory limitations to the transferability of future assets, parts of and undivided interests in assets is overridden by the draft Model Law (see also recommendation 23 of the Secured Transactions Guide*, which has not been reflected in any article of the draft Model Law)*.]

Article 2. Definitions and rules of interpretation

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will also refer to other rules of interpretation, such as the following: (a) the word "or" is not intended to be exclusive; (b) the singular includes the plural and vice versa; and (c) the words "include" or "including" are not intended to indicate an exhaustive list (see* Secured Transactions Guide*, Introduction, para. 17)*.]

For the purposes of this Law:

(a) "Acquisition secured creditor" means a secured creditor that has an acquisition security right;

(b) "Acquisition security right" means a security right in a tangible asset, intellectual property or the rights of a licensee under a licence of intellectual property 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 it [to the extent the credit is in fact applied for that purpose];

[*Note to the Working Group: The Working Group may wish to note that the term "tangible asset" throughout the draft Model Law means tangible assets in the strict sense, including consumer goods, equipment and inventory and excluding money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see definition of "tangible asset" below). However, all types of asset that may be subject to physical possession are included in the definition of the term "possession" below. The Working Group may also wish to consider the wording within square brackets in this definition, which is intended to ensure that a security right qualifies as an acquisition security right only if the credit provided for the purpose of acquiring the encumbered asset is in fact used for that purpose. The Working Group may further wish to consider whether it is redundant to refer to "an obligation incurred or credit otherwise provided" or whether it is sufficient to simply refer to "other credit extended". The Working Group may also wish to consider whether the Guide to Enactment should explain that, where a security right secures obligations in addition to the credit extended and used for the purpose of acquiring the encumbered asset, it is an ordinary security right to the extent of those additional obligations*.]

(c) "Bank account" means an account[, other than a securities account,] maintained by a bank, to which funds may be credited or debited. The term includes a checking or other current account, as well as a savings or time deposit account. The term does not include a right against the bank to payment evidenced by a negotiable instrument;

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in this definition, which is intended to draw a clear distinction from a securities account in which funds are routinely credited or debited when transactions relating to securities credited to those accounts are settled. Alternatively, this distinction may be explained in the Guide to Enactment, which can explain that, to underline this distinction, the draft Model Law defines the term "securities account" as "an account maintained by an intermediary to whom securities may be credited or debited" and the term "securities" in a manner that clearly excludes funds. The Working Group may further wish to consider whether it is appropriate to retain the second sentence of this definition since the terms "checking or other current account" and "savings or time deposit account" are business terms rather than legal terms and therefore may not be used in all enacting States or have the same meaning in all enacting States. These terms may instead be used in the Guide to Enactment as examples. The Guide to Enactment will also explain that the enacting State may wish*

to include a definition of the term "bank" in its secured transactions law or rely for this purpose on other law.]

(d) "Certificated non-intermediated securities" means non-intermediated securities represented by a certificate that:

(i) Provides that the person entitled to the securities is the person in possession of the certificate; or

(ii) Identifies the person entitled to the securities;

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that the term "represented" is broad enough to cover the approaches taken in different jurisdictions and that the term "certificate" means only a tangible document subject to physical possession*.]

(e) "Competing claimant" means a creditor of a grantor or other person with rights in an encumbered asset that may be in conflict with the rights of a secured creditor in the same encumbered asset and includes:

(i) Another secured creditor of the grantor that has a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);

(ii) Another creditor of the grantor that has a right in the same encumbered asset, such as a judgement creditor or [the enacting State to specify creditors that have a right in the encumbered asset under other law];

(iii) The insolvency representative in insolvency proceedings in respect of the grantor; or

(iv) A buyer [or other transferee], lessee or licensee of the encumbered asset;

[*Note to the Working Group: The Working Group may wish to note that the text in square brackets in subparagraph (e)(iv) has been included to align this definition with the formulation of other articles (see, for example, arts. 42 and 43). The Working Group may also wish to note that, if the bracketed text is to be retained, its position may have to be reconsidered as in some jurisdictions lessees and licensees are considered transferees*.]

(f) "Consumer goods" means goods [primarily] used or intended to be used by a physical person for personal, family or household purposes;

[*Note to the Working Group: The Working Group also may wish to add the word "primarily" to this definition to cover the case where goods are used by the grantor for both business and personal purposes in which event the primary use would determine whether they qualify as consumer goods. The Working Group may also wish to consider whether the definitions of the terms "equipment" and "inventory" should also be revised to refer to tangible assets "*primarily used or intended to be used …*"*.]

(g) "Control agreement":

(i) With respect to uncertificated non-intermediated securities means an agreement in writing among the issuer, the grantor and the secured creditor, according to which the issuer agrees to follow instructions from the secured creditor with respect to the securities without further consent from the grantor; and

(ii) With respect to rights to payment of funds credited to a bank account means an agreement in writing among the depositary bank, the grantor and the secured creditor, according to which the depositary bank agrees to follow instructions from the secured creditor with respect to the payment of the funds credited to the bank account without further consent from the grantor;

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) the enacting State may wish to add a reference to its requirements for the authorization of an agreement (e.g. signature); and (b) a control agreement does not need to be in a single writing*.]

(h) "Debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right secured by that obligation. The term includes a secondary obligor such as a guarantor of a secured obligation, and a transferor in an outright transfer of a receivable;

(i) "Debtor of the receivable" means a person that owes payment of a receivable. The term includes a guarantor or other person secondarily liable for payment of the receivable;

(j) "Encumbered asset" means a tangible or intangible movable asset that is subject to a security right. The term includes a receivable that is the subject of an outright transfer;

(k) "Equipment" means a tangible asset [primarily] used [or intended to be used] by a person in the operation of its business;

(l) "Financial contract" means a contract relating to any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to those transactions entered into in financial markets and any combination of those transactions;

(m) "Future asset" means a tangible or intangible movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded;

(n) "Grantor" means a person that creates a security right to secure either its own obligation or that of another person. The term includes the transferor in an outright transfer of a receivable;

(o) "Independent undertaking" means an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

[*Note to the Working Group: The Working Group may wish to note that this definition is based on the definition contained in article 2, paragraph (1) of the* United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.]

(p) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(q) "Intangible asset" means all forms of movable assets other than tangible assets. The term includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account, money, negotiable instruments, negotiable documents and non-intermediated securities;

[*Note to the Working Group: The Working Group may wish to note that, in view of the narrow definition of the term "tangible asset" (in line with the way it is used in the draft Model Law), the definition of the term "intangible asset" includes some types of asset that may be subject to physical possession and thus are included in the definition of the term "possession". The Working Group may wish to consider the use of the terms "intangible asset", "possession" and "tangible asset", and consider whether these definitions should be revised*.]

(r) "Inventory" means tangible assets [primarily] held by a person for sale or licence in the ordinary course of the grantor's business. The term includes raw and semi-processed materials (work-in-process);

(s) "Knowledge" means actual knowledge;

(t) "Mass or product" means tangible assets other than money that are so physically associated or united with other tangible assets that they have lost their separate identity;

(u) "Money" means currency currently authorized as legal tender by any State. The term does not include funds credited to a bank account or negotiable instruments;

[*Note to the Working Group: The Working Group may wish to note that the term "money", whose definition is based on a definition contained in the* Secured Transactions Guide*, is intended to include not only the national currency of the enacting State but also foreign currency. The Working Group may wish to consider deleting the word "currently" in this definition as redundant (since if currency is not "currently authorized" as "legal tender", then it would not qualify as "legal tender"). The Working Group may also wish to consider deleting the second sentence of the definition since rights to payment of funds credited to a bank account and negotiable instruments are recognized as distinct concepts in the draft Model Law and thus it is already clear that the concept "money" does not include them. All these matters may be usefully discussed in the Guide to Enactment*.]

(v) "Non-intermediated securities" means securities other than securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

[*Note to the Working Group: The Working Group may wish to note the Guide to Enactment will explain that the term "non-intermediated securities" does not include the rights of an intermediary or a competing claimant in securities held by the intermediary directly against the issuer because those securities are credited by the intermediary to a securities account in the name of the grantor and therefore qualify as intermediated securities for the purposes of that transaction*.]

(w) "[Close-out netting] [Netting] agreement" means an agreement between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (ii) under two or more netting agreements;

(x) "Notice" means a communication in writing;

[*Note to the Working Group: In view of the definitions of the term "notice" in the* Secured Transactions Guide *and in the* UNCITRAL Guide on the Implementation of a Security Rights Registry *(the "*Registry Guide*") and to avoid any ambiguity between a notice registered in the general security rights registry and a notice of enforcement, the Working Group may wish to consider whether a new term should be introduced and defined in this article to reflect a notice to be registered in the general security rights registry, while the current definition of the term "notice" could be retained to refer to other types of notice (e.g., given in the context of enforcement). The new term could be "security right notice" or "registry notice" and be defined along the following lines: "means a communication to the Registry in writing in the form prescribed by the [Registry] [Regulation] [other Law relating to the registration of notices of security rights]". Alternatively, wording along the following lines could be included in the definition of the term "notice": "and, in the context of the provisions in this Law that govern the registration of a notice in the security rights registry, means a communication in writing in the form prescribed by the [Registry] [Regulation] [other Law relating to the registration of notices of security rights"*.]

(y) "Notification of a security right in a receivable" means a notice by the grantor or the secured creditor informing the debtor of the receivable that a security

right has been created in the receivable. A notification of the security right may include a payment instruction;

[*Note to the Working Group: The Working Group may wish to note that the requirement for the identification of the encumbered receivable and the secured creditor that was included in a previous version of this definition (and in this definition in the* Secured Transactions Guide*), was moved to article 70, paragraph 1, as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in article 70, paragraph 1. The Working Group may wish to consider whether the second sentence of this definition also states a substantive rule and should be moved to article 70*.]

(z) "Possession" means the actual [physical] possession of a tangible asset, money, negotiable instruments, negotiable documents and certificated non-intermediated securities by a person or its representative, or by an independent person that acknowledges holding it for that person;

[*Note to the Working Group: The Working Group may wish to note that the definition of "possession" has been revised to refer to all types of tangible asset that may be subject to physical possession (see definitions of terms "tangible asset" and intangible asset")*.]

(aa) "Priority" means the right of a secured creditor to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant;

(bb) "Proceeds" means whatever is received in respect of an encumbered asset. The term includes what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, civil and natural fruits, insurance proceeds, claims arising from defects in, damage to or loss of an encumbered asset, and proceeds of proceeds;

[*Note to the Working Group: The Working Group may wish to consider whether the definition of the term "proceeds" should be limited to proceeds received by the grantor, and not extend to proceeds received, for example, by a transferee of the original encumbered asset. A different approach could potentially prejudice a third party that acquired proceeds from a transferee and had no means of knowing or finding out that the asset was the proceeds of an asset in which somebody held a security right (e.g. grantor sells the encumbered asset, a green widget, to X who then trades it in for a blue widget and then sells the blue widget to Y. Y has no means of knowing or finding out that the blue widget is subject to a security right created by the grantor/transferor). The Working Group may wish to note that the Guide to Enactment will explain that the term "civil fruits" covers revenues, dividends and distributions*.]

(cc) "Receivable" means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

(dd) "Right to receive the proceeds under an independent undertaking" means the right to receive a payment due, a draft accepted or deferred payment incurred or another item of value, in each case to be paid or delivered by the guarantor/issuer, confirmer or nominated person giving value for a draw under an independent undertaking. The term also includes the right to receive payment in connection with the purchase by a negotiating bank of a negotiable instrument or a document under a complying presentation. The term does not include:

(i) The right to draw under an independent undertaking; or

(ii) What is received upon honour of an independent undertaking;

[*Note to the Working Group: The Working Group may wish to note that the definition of this term is included here only for the purposes of the articles in which this term is used, that is, article 1, subparagraph 3(a), under which the right to receive*

the proceeds is excluded from the scope of the draft Model Law, and article 1, paragraph 4, under which the proceeds of an excluded type of asset are also excluded.]

(ee) "Secured creditor" means a creditor that has a security right. The term includes a transferee in an outright transfer of a receivable;

(ff) "Secured obligation" means an obligation secured by a security right. This term does not apply to outright transfers of receivables;

(gg) "Security agreement" means an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that creates a security right. The term also includes an agreement for the outright transfer of a receivable;

(hh) "Securities" means:

[(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:

a. Is one of a class or series, or by its terms is divisible into a class or series, of obligations, shares or participations; and

b. Is, or is of a type, dealt in or traded on securities exchanges or financial markets, or is a medium for investment in the area in which it is issued or dealt in or traded; [or]

[(ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b;]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that each enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of this term in its securities transfer law*.]

(ii) "Securities account" means an account maintained by an intermediary to which securities may be credited or debited;

[*Note to the Working Group: The Working Group may wish to note that this definition is derived from article 1, subparagraph (c), of the Geneva Securities Convention*.]

(jj) "Security right" means a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation. The term also includes the right of the transferee in an outright transfer of a receivable;

(kk) "Tangible asset" means all forms of goods. The term includes consumer goods, equipment and inventory [but not money, negotiable instruments, negotiable documents or certificated non-intermediated securities.]

[*Note to the Working Group: The Working Group may wish to consider whether: (a) the draft Model Law should use the term "goods" to define the term "tangible asset" given that this concept has a particular legal meaning in common law jurisdictions and may not translate easily to other languages; (b) the terms consumer goods, equipment and inventory should be deleted as unnecessary and perhaps confusing since these terms do not refer to subcategories of tangible assets but rather to the way in which particular tangible assets are used by the grantor (thus, the same car could qualify as "consumer goods" if it is used by the grantor for personal purposes, or as "equipment" if it is used by the grantor in its business, or as "inventory" if the grantor happens to be a car dealer or manufacturer); (c) for greater clarity, money, negotiable instruments, negotiable documents and certificated non-intermediated securities should be excluded from this definition or (included in the definition of "intangible asset") since these types of asset are treated*

in some jurisdictions as tangible assets, but in the draft Model Law are subject to asset-specific rules.]

(ll) "Uncertificated non-intermediated securities" means non-intermediated securities not represented by a certificate.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

[*Note to the Working Group: The Working Group may wish to note that, at its twenty-sixth session, it agreed that this article should be based on article 3 of the UNCITRAL Model Law on Cross-Border Insolvency or on article 38 of the Assignment Convention (see A/CN.9/830, para. 17). However, the latter provision, which refers only to international agreements and to agreements that specifically govern a transaction governed by the* Assignment Convention, *contains a rule of hierarchy among international agreements (the specific prevails over the general text) rather than a domestic law rule dealing with the prevalence of international treaties over domestic law. To explicitly preserve the application of regional law (e.g. EU directives), the Working Group may also wish to consider including in this article a second paragraph that could read along the following lines: "This Law does not affect the application of the rules of a Regional Economic Integration Organisation, whether adopted before or after this Law" (see art. 26(6) of the Hague Convention on Choice of Court Agreements of 30 June 2005)*.]

Article 4. Party autonomy

1. Except as otherwise provided in articles [5, 6, 9, 62, 63, 81, paragraph 1, 47-50, 96-111], the provisions of this Law may be derogated from or varied by agreement.

2. An agreement referred to in paragraph 1 does not [negatively] affect the rights or obligations of any person that is not a party to the agreement.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 should rather refer to a negative effect or modification of third-party rights, as an agreement may have an indirect effect on or benefit to third-party rights (e.g. a subordination agreement)*.]

Article 5. General standards of conduct

1. A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.

2. The general standards of conduct set forth in paragraph 1 cannot be waived unilaterally or varied by agreement.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 is necessary given that article 4 already states that the rule embodied in this article cannot be waived unilaterally or varied by agreement. The Working Group may wish to note that the Guide to Enactment will explain that: (a) the concept of "commercial reasonableness" refers to the commercial context and best practices; and (b) meeting the specific standards referred to in other articles of this Law would generally be construed as meeting the general standards of conduct referred to in this article (see A/CN.9/830, paras. 31-33)*.]

Chapter II. Creation of a security right

A. General rules

Article 6. Security agreement

1. A security right is created by a security agreement that satisfies the requirements of paragraphs 2 to 5, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.

2. A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.

3. A security agreement must:

(a) Provide for the creation of a security right;

(b) Identify the secured creditor and the grantor;

(c) Describe the secured obligation;

(d) Describe the encumbered assets as provided in article 9 [; and

(e) Indicate the maximum monetary amount for which the security right may be enforced].[3]

4. Except as provided in paragraph 5, a security agreement must be [the enacting State should specify whether the security agreement must be "concluded in" or "evidenced by" a writing] that satisfies the requirements of paragraph 3 and is signed by the grantor.

5. A security agreement may be oral if the secured creditor has possession [or control] of the encumbered asset.

[*Note to the Working Group: The Working Group may wish to consider whether the requirements set out in paragraph 2 apply only to situations in which a written security agreement is required (i.e. they do not apply to possessory security rights where an oral security agreement is permitted). In this regard, the Working Group may wish to note that, in the case of oral security agreements: (a) requirements (a)-(c) are already covered by paragraph 1 of this article insofar as it refers to the creation of a "security right" and requires a "security agreement", as defined in the draft Model Law; and (b) requirements (d) and (e) by their very nature are inapplicable to the situation where an oral security agreement is permitted because, where there is possession: (i) there is no need for a description that identifies the encumbered asset adequately since the very fact of possession satisfies the description requirement; and (ii) the requirement to agree to a maximum amount to be secured is inapplicable since this requirement is practically capable of being satisfied only if there is a written agreement. If the Working Group decides to delete paragraph 2, paragraph 3 should be revised to read along the following lines: "... a writing that: (a) identifies the secured creditor and the grantor; (b) Describes the secured obligation; (c) Describes the encumbered assets as provided in article 9; (d) Is signed by the grantor[; and (e) Indicates the maximum monetary amount for which the security right may be enforced". The Working Group may wish to note that the Guide to Enactment will explain that the enacting State may wish to select in paragraph 4 one of the two alterative wordings that are set out within square brackets. The Working Group may wish to consider the bracketed text in paragraph 5, which would dispense with the need for a written security agreement if the secured creditor has control with respect to a bank account or non-intermediated security*.]

[3] The enacting State may wish to include this subparagraph in the draft Model Law if it determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

Article 7. Obligations that may be secured

A security right may secure any type of obligation, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Article 8. Assets that may be encumbered

A security right may encumber:

(a) Any type of movable asset, including future assets;

(b) Parts of assets and undivided rights in movable assets;

(c) Generic categories of movable assets; and

(d) All of a grantor's movable assets.

[Article 9. Required description of assets

1. [For the purpose of satisfying the requirements for a [written] security agreement referred to in article 6, paragraph 3, the] [The] assets to be encumbered must be described in the security agreement in a manner that reasonably allows their identification.

2. A generic description that refers to all assets within a category of assets or to all of the grantor's assets meets the standard referred to in paragraph 1.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in paragraph 1, which is intended to limit the application of this article to written agreements. The Working Group may also wish to note that, in view of their importance, the requirements for the description of encumbered assets have been moved from article 6, subparagraph 3(d) to this new article*.]

Article 10. Proceeds

1. A security right in an asset extends to its identifiable proceeds.

2. Notwithstanding paragraph 1, where proceeds in the form of funds credited to a bank account or money are commingled with other assets of the same kind the security right extends to the commingled assets.

3. Subject to paragraph 4, the obligation secured by a security right that continues in commingled assets in accordance with paragraph 2 is limited to the value of the proceeds immediately before they were commingled.

4. If at any time after the commingling, the value of the balance credited to the bank account or of the commingled money is less than the value of the proceeds immediately before they were commingled, the obligation secured by the security right that continues in the commingled assets in accordance with paragraph 2 is limited to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, if new proceeds are deposited after the account or pool of money is depleted below the value of the proceeds originally deposited or contributed, then one would need to reapply these same rules to these later proceeds (i.e. the amount of each proceeds claim must be assessed separately)*.]

Article 11. Assets commingled in a mass or product

1. A security right in a tangible asset that is commingled in a mass or product extends to the mass or product.

2. The obligation secured by a security right that continues in a mass or product in accordance with paragraph 1 is limited to the value of the encumbered asset immediately before it became part of the mass or product.

[3. Where more than one security right continues in the same mass or product in accordance with paragraph 1 and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all security rights.]

[*Note to the Working Group: The Working Group may wish to note that paragraph 3 has been added to more closely align this article with recommendations 22 and 91 of the* Secured Transactions Guide.]

B. Asset-specific rules

Article 12. Contractual limitations on the creation of a security right

1. A security right in a receivable or other intangible asset, negotiable instrument or right to payment of funds credited to a bank account is effective as between the grantor and the secured creditor and as against the debtor of the receivable or other intangible asset, the obligor under a negotiable instrument, or the depositary bank notwithstanding an agreement limiting in any way the grantor's right to create a security right entered into between the initial or any subsequent grantor and:

(a) The debtor of the receivable or other intangible asset, the obligor under the negotiable instrument or the depositary bank; or

(b) Any subsequent secured creditor.

2. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to [the receivable or other intangible asset, negotiable instrument or right to payment of funds credited to a bank account] [the encumbered asset] or the security agreement on the sole ground of the breach of that agreement[, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 72, paragraph 2].

3. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

4. This article applies only to receivables:

(a) Arising from a contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(b) Arising from a contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Arising upon [net settlement of payments due pursuant to a netting agreement involving more than two parties] [the termination of all outstanding transactions].

[*Note to the Working Group: The Working Group may wish to note that this article, which is based on recommendation 24 of the* Secured Transactions Guide*, which in turn is based on article 9 of the* United Nations Convention on the Assignment of Receivables in International Trade *(the "*United Nations Assignment Convention*"), has been revised to address contractual limitations on the creation of a security right in assets in addition to receivables, namely other intangible assets, negotiable instruments and rights to payment of funds credited to a bank account (see A/CN.9/830, paras. 59-63). The Working Group may wish to consider the two sets of bracketed wording in paragraph 4(d) (the first set is based on rec. 24, subpara. (f)(iv) of the* Secured Transactions Guide *and while the second set is based on art. 1, subpara. 3(d) of the draft Model Law).*]

Article 13. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

Alternative A

1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset without any further action by either the grantor or the secured creditor.

2. If the right referred to in paragraph 1 is an independent undertaking, the security right automatically extends to the right to receive the proceeds of, but not the right to draw under, the independent undertaking.

Alternative B

1. A security right in a receivable or other intangible asset, or a negotiable instrument extends to any personal or property right that secures or supports payment or other performance of the encumbered asset that is transferable without a new act of transfer.

2. If the right referred to in paragraph 1 of this article is transferable only with a new act of transfer, the grantor is obliged to create a security right in it in favour of the secured creditor.

[3. This article does not affect a right in immovable property that under other law is transferable separately from the obligation that the right in the immovable property secures.]

4. Paragraph 1 does not affect any duties of the grantor to the debtor of the receivable or other intangible asset, or the obligor of the negotiable instrument.

5. To the extent that the automatic effects of paragraph 1 are not impaired, this article does not affect any requirement under other law relating to the form or registration of the creation of a security right in any asset that is not covered in this Law.

[*Note to the Working Group: The Working Group may wish to consider alternatives A and B of paragraphs 1 and 2 of this article. Alternative A reflects the thrust of recommendation 25 of the* Secured Transactions Guide*, while alternative B reflects the thrust of article 10 of the* Assignment Convention *(rather than rec. 25). Under alternative B, the security right extends automatically to accessory security or supporting rights, while with respect to independent rights, the grantor is obliged to create a security right in them in favour of the secured creditor. Thus, there is no inconsistency with article 1, subparagraph 3(a), and there is no need to also include the full text of recommendation 127 of the* Secured Transactions Guide *to protect the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking. If alternative A were preferred, the Working Group may wish to consider whether the thrust of recommendation 127 (which has not been included in the draft Model Law as it does not apply to the right to receive the proceeds under an independent undertaking), should also be included in this article to avoid any adverse impact on the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking. The Working Group may wish to consider whether paragraph 4 should be retained in view of the fact that articles 70, 77 and 78 have been included in the draft Model Law so as to ensure that the rights of the debtor of an encumbered receivable and the obligor of an encumbered negotiable instrument under other law are protected. In this connection, the Working Group may wish to note that there is no provision equivalent to articles 70, 77 and 78 to preserve the rights of an obligor of an intangible asset other than a receivable*.]

Article 14. Negotiable documents and tangible assets covered

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the negotiable document is in possession

of the asset[, directly or indirectly,] at the time the security right in the document is created.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that in view of the definition of the term "possession" in article 2, possession of the issuer includes possession by its representative or a person acting on behalf of the issuer. The Working Group may wish to consider whether the bracketed wording, which comes from recommendation 28 of the* Secured Transactions Guide*, should be retained. The Guide to Enactment will also explain that a security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist even after the document no longer covers the assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets, but not once they are released by the issuer (see art. 24, para. 2, below.)*]

Article 15. Tangible assets with respect to which intellectual property is used

A security right in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 16. General methods for achieving third-party effectiveness

A security right in an asset is effective against third parties if:

(a) A notice with respect to the security right is registered in the general security rights registry (the "Registry") [or in any specialized registry or title certificate to be specified by the enacting State][4]; or

(b) The secured creditor has possession of that asset.

Article 17. Proceeds

1. If a security right in an asset is effective against third parties, a security right in any proceeds of that asset is effective against third parties without any further action by the grantor or the secured creditor if the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

2. If a security right in an asset is effective against third parties, a security right in any type of proceeds of that asset other than the types of proceeds referred to in paragraph 1 is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] days after the proceeds arise; and

(b) Thereafter, if the security right in the proceeds is made effective against third parties by one of the methods applicable to the relevant type of encumbered asset referred to in this chapter before the expiry of the time period provided in subparagraph (a).

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, unlike recommendation 39 of the* Secured Transactions Guide*, paragraph 1 does not refer to the description of the proceeds in the notice as, once the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, not proceeds,*

[4] An enacting State may wish to implement this provision if it has a specialized registration system.

and article 16 was sufficient in dealing with the third-party effectiveness of a security right in those assets.]

Article 18. Changes in the method for achieving third-party effectiveness

1. A security right made effective against third parties by one of the methods provided in this chapter may subsequently be made effective against third parties by any other method applicable to the relevant type of encumbered asset.

2. A security right that is effective against third parties remains effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.

Article 19. Lapse in third-party effectiveness

1. If third-party effectiveness of a security right lapses, it may be re-established by any of the methods applicable to the relevant encumbered asset provided in this chapter.

2. If the third-party effectiveness of security right is re-established under paragraph 1, the security right is effective against third parties only as of the time its third-party effectiveness is re-established.

Article 20. Impact of a transfer of an encumbered asset

Except as provided in article 37, a security right in an asset remains effective against third parties even if the asset is sold or otherwise transferred, leased or licensed.

[*Note to the Working Group: The Working Group may wish to consider whether the rule that a security right follows an encumbered asset in the hands of a transferee fits more in the chapter on third-party effectiveness (impact on registration; see art. 37) and in the chapter on priority (authorization of the transfer by the secured creditor or transfer in the ordinary course of business of the transferor; see art. 42, paras. 2 to 8)*.]

Article 21. Change of the applicable law to this Law

1. If a security right is effective against third parties under the law of another State and this Law becomes applicable, the security right remains effective against third parties under this Law for [a short period of time to be specified by the enacting State] days after the change and, thereafter, only if the third-party effectiveness requirements of this Law are satisfied before the expiry of that time period.

2. If the security right remains effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.

Article 22. Acquisition security rights in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation without any further action by the grantor or the secured creditor.

B. Asset-specific rules

Article 23. Rights to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account may also be made effective against third parties by:

(a) The security right being created in favour of the depositary bank;

(b) Conclusion of a control agreement; or

(c) The secured creditor becoming the account holder.

Article 24. Negotiable documents and tangible assets covered

1. If a security right in a negotiable document is effective against third parties, the security right that extends to the asset covered by the document in accordance with article 14 is also effective against third parties.

2. During the period when a negotiable document covers an asset, a security right in the asset may be made effective against third parties by the secured creditor's possession of the document.

3. A security right in a negotiable document that was made effective against third parties by the secured creditor's possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the negotiable document has been relinquished to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the negotiable document.

Article 25. Non-intermediated securities

A security right in uncertificated non-intermediated securities may also be made effective against third parties by:

(a) Notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer; or

(b) Conclusion of a control agreement.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that States parties to the* Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes *(Geneva, 1930; the "*Geneva Uniform Law*") may wish to include in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right (see art. 19; art. 22 of the* United Nations Convention on International Bills of Exchange and International Promissory Notes*; the "*Bills and Notes Convention*" contains a similar rule). An enacting State that decides to do so will have to adjust article 60 of the draft Model Law to deal with the comparative priority of such a security right*.]

(A/CN.9/WG.VI/WP.63/Add.1) (Original: English)

Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Chapter IV. Registration of a notice with respect to a security right

A. General rules

Article 26. Establishment of the general security rights registry

The Registry [is] [will be] established [the enacting State to specify whether the Registry is established by this Law or will be established later through a regulation or another law, which will enact the provisions of the Annex to this Law] for the purpose of receiving, storing and making accessible to the public information in registered notices with respect to security rights in accordance with this Law and [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law].

[*Note to the Working Group: The Working Group may wish to note that this article has been revised to be aligned with recommendation 1 of the* Registry Guide. *The Working Group may also recall that at its twenty-fifth session it decided to separate legal registration rules that were retained in this chapter and technical registration issues that were moved to the annex of the draft Model Law (see A/CN.9/802, paras. 12-14). This approach is based on the assumption that depending on its legislative policy and drafting technique, each enacting State may implement the registration-related rules partly in the secured transactions law and partly in administrative rules (a Regulation), or in a separate law (see* Registry Guide, *subpara. 9(m)). However, the result may be more difficult for enacting States to understand and implement. For example, it may not be easy for an enacting State to understand why there is no article in the draft Model Law on the rejection of a registration which is a fundamental issue or the authorization to by the grantor to a third party to request information about a registration. The Working Group may also wish to consider which of the definitions of the* Registry Guide *may need to be added to article 2. The Working Group may also wish to note that that some modern secured transactions laws provide for the registration of notices other than those relating to security right (e.g. enforcement notices and notices of preferential claims) and consider whether registration of such notices should be foreseen in the draft Model Law or at least discussed in the Guide to Enactment (see* Registry Guide, *paras. 51 and 52).*]

Article 27. Public access to registry services

1. The security rights registry must be open to the public in accordance with paragraph 2 and [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law].

2. Any person may submit a notice or a search request to the Registry in accordance with the provisions of this Law and [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law].

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 54, subparagraphs (c) and (f) of the* Secured Transactions Guide *and 4 of the* Registry Guide. *The Working Group may also wish to note that the Guide to Enactment will clarify that, in line with recommendation 54, subparagraph (j) of the* Secured Transactions Guide *and recommendation 5 of the* Registry Guide, *the Registry should be electronic, if possible (which means that it may be hybrid or paper), and consider whether the draft Model Law should be drafted to accommodate all types of registry*.]

Article 28. Grantor's authorization for registration

1. Registration of an initial notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the grantor in writing, before or after registration.

2. Registration of an amendment notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the grantor in writing, before or after registration, if the amendment notice:

(a) Contains a description of [additional] encumbered assets [not included in the security agreement or other authorization of the grantor];

(b) Contains the identifier(s) and addresses of one or more than one [additional] grantor [not included in the security agreement or other authorization of the grantor]; [or]

[(c) Increases the maximum amount for which the security right to which the registration relates may be enforced;] [or]

[(d) [The enacting State to specify any additional amendment notices that require authorization by the grantor in writing]].

3. Except as provided in paragraph 4, registration of an amendment notice that contains the identifier and address to one or more than one additional grantor is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the additional grantor in writing.

4. [Notwithstanding paragraph 3, no] [No] authorization by the additional grantor is required if the additional grantor is a transferee of an encumbered asset described in a previously registered notice to which the amendment notice relates.

5. A security agreement [that meets the requirements of article 6], or a written agreement that amends the security agreement, is sufficient to constitute authorization by the grantor for the registration of an initial or amendment notice covering the assets described therein.

6. Evidence of the existence of the authorization of the grantor is not required for the Registrar to accept the registration of an initial or amendment notice.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 71 of the* Secured Transactions Guide *and 7, subparagraph (b) of the* Registry Guide. *The Working Group may also wish to consider the alternatives included within square brackets in paragraphs 1 and 2 ("is ineffective unless" or is "effective if"; see also article 38 below) and in subparagraph 2(a). The second set of bracketed words in subparagraph 2(a) is intended to clarify that, if the secured creditor forgets to set out in the initial notice some assets included in the security agreement or other authorization of the grantor and then realizes this error, the amendment notice does not "contain a description of additional assets" and would not require the grantor's separate authorization. The Working Group may wish to note that in paragraph 6 reference is made to the "registrar" rather than to the "registry", as the latter term is defined as a system and not as a person (the term "registrar" may need to be defined to include the registry*

staff). The Working Group may also wish to note that the Guide to Enactment will explain that registration of an amendment notice that adds encumbered assets or increases the maximum amount may affect intervening secured creditors, and therefore takes effect only when the registration of the amendment notice (not the initial notice) becomes effective (see article 31, para. 1 below). The Guide to Enactment will also explain that there is no need to register an amendment notice or obtain the authorization of the grantor with respect to "additional assets" that: (a) are the proceeds of encumbered assets described in a previously registered notice, as the security right extends to proceeds by law (see art. 10, para. 1); and (b) are cash proceeds (money, receivables, negotiable instruments or funds credited to a bank account) (see art. 17, para. 1).]

Article 29. A notice may relate to more than one security right

A single notice may relate to one or more than one security right created by the grantor in favour of the same secured creditor whether they arise under one or more than one security agreement between the same parties.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 68 of the* Secured Transactions Guide *and 14 of the* Registry Guide.]

Article 30. Time when a notice may be registered

An initial or amendment notice may be registered at any time, including before the conclusion of the security agreement, to which the notice relates, or, in the case of a future asset, before the grantor acquires rights in the asset or the power to encumber it, provided that registration is authorized by the grantor in accordance with article 28.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 67 of the* Secured Transactions Guide *and recommendation 13 of the* Registry Guide.]

Article 31. Time of effectiveness of a registered notice

1. The registration of an initial or amendment notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

[2. The date and time when the information in an initial or amendment notice is entered into the registry record so as to be accessible to searchers is indicated in the public registry record.]

[3. Information in an initial or amendment notice is entered into the registry record as soon as practicable after the notice is submitted and in the order in which it was submitted.]

4. The registration of a cancellation notice is effective from the date and time when the information in any previously registered notice to which it relates is no longer accessible to searchers of the public registry record.

[5. The date and time when the information in any initial or amendment notice to which a cancellation notice relates is no longer accessible to searchers is indicated in the registry record.]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 70 of the* Secured Transactions Guide *and 11 of the* Registry Guide. *The Working Group may also wish to consider whether paragraphs 2, 3 and 5 of this article that appear within square brackets should be deleted and matters addressed therein should be addressed in the Annex to the draft Model Law*.]

Article 32. Period of effectiveness of a registered notice

Option A

1. A registered notice is effective for [a period of time, such as five years, to be specified by the enacting State].

2. The period of effectiveness of a registered notice may be extended by the registration of an amendment notice indicating this intent in the designated field within [a period of time, such as six months, to be specified by the enacting State] before its expiry.

3. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for [the period of time specified in paragraph 1] beginning from the time the current period would have expired if the amendment notice had not been registered.

Option B

1. A registered notice is effective for the period of time indicated by the registrant in the designated field of the notice.

2. The period of effectiveness of a registered notice may be extended at any time before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness.

3. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period of time indicated in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

Option C

1. A registered notice is effective for the period of time indicated by the registrant in the designated field of the notice, not exceeding [a maximum period of time, such as 20 years, to be specified by the enacting State].

2. The period of effectiveness of a registered notice may be extended within [a period of time, such as six months, to be specified by the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness not exceeding [the maximum period of time specified in paragraph 1].

3. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period of time specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 69 of the* Secured Transactions Guide *and 12 of the* Registry Guide. *The Working Group may also wish to note that the Guide to Enactment will explain that the period of effectiveness can be indicated by a reference to a number of years or an expiry date, as specified by the Registry*.]

Article 33. Organization of information in registered notices

The registry record is organized so that the information in a registered initial and in any associated registered notice can be retrieved by a search of the registry record that uses the identifier of the grantor or the registration number assigned to the initial notice as the search criterion.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 16 of the* Registry Guide.]

Article 34. Information required in an initial notice

An initial notice must contain the following items of information in the designated field for each item:

(a) The identifier and address of the grantor [and any additional grantor information that the enacting State may decide to permit or require to be entered to assist in uniquely identifying the grantor];

(b) The identifier and address of the secured creditor or its representative; [and]

(c) A description of the encumbered asset in accordance with article 9;

[(d) The period of effectiveness of the registration];[1] and

[(e) A statement of the maximum amount for which the security right to which the registered notice relates may be enforced.][2]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 57 of the* Secured Transactions Guide *and 23 of the* Registry Guide. *The Working Group may also wish to consider whether articles 12-14 of the Annex should be moved to a new article that would elaborate on the items set out in article 34. The Working Group may also wish to note that many modern registries provide for serial number registration of serial number assets and consider whether serial number registration should be addressed in the draft Model Law or discussed only in the Guide to Enactment (see* Secured Transactions Guide, *chap. IV, paras. 34-36 and* Registry Guide, *paras. 131-134). The Working Group may also wish to note that the Guide to Enactment will discuss the possibility of using unique numbers as grantor identifiers and of the Registry being connected to an identity-number database to ensure that the name and identity number entered match. This procedure could work for both types of grantors, individuals and entities, or only for one type depending on the availability of identity numbers. In such systems, a registration will not be processed if the two do not match (this would be the only exclusion to the general rule that the registry does not verify the veracity of the information). With respect to subparagraph (e), the Guide to Enactment will refer to the discussion in the* Registry Guide *(see paras. 200-204).*]

Article 35. Impact of a change of the grantor's identifier

1. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice adding the new identifier of the grantor within [a short period of time, such as 30 days, to be specified by the enacting State] after the change, the security right to which the notice relates remains effective against third parties and retains its priority.

2. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice adding the new identifier of the grantor after the expiration of the time period indicated in paragraph 1:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the change in the grantor's identifier but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 61 of the* Secured Transactions Guide. *The Working Group may also wish to note that the Guide to Enactment will explain that: (a) if the secured creditor registers the amendment notice during the "grace*

[1] This provision will be necessary, if the enacting State implements option B or C of article 32.

[2] This provision will be necessary if the enacting State includes in its law article 6, subparagraph 3(e) of the draft Model Law.

period" contemplated in paragraph 1 of this article, the third-party effectiveness and priority of its security right is preserved as against the categories of competing claimants described in this article even if they acquired their rights prior to the registration of the amendment notice; (b) while a secured creditor's failure to register an amendment notice adding the grantor's new identifier has the negative priority consequences against the categories of competing claimants described in this article, it does not prejudice the third-party effectiveness or priority of its security right as against other categories of competing claimants such as the grantor's insolvency representative; (c) while the "grace period" begins to run from the time of the name change regardless of whether or not the secured creditor actually knew about the name, later registration of a security right amendment notice change after the expiry of that grace period will still protect the secured creditor as against the categories of competing claimants described in this article if their rights arise after the registration; and (d) an amendment notice must be registered for the purposes of the rules stated in this article only if the name change would make the registration irretrievable by a searcher using the new name of the grantor as the search criterion. The Working Group may wish to consider whether all those issues should be addressed explicitly in this chapter and/or the priority chapter.]

Article 36. Impact of errors in required information

1. An incorrect statement of the grantor identifier in a notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.

2. An incorrect or insufficient statement of the information required in a notice other than the grantor's identifier does not render the registration ineffective unless the error would seriously mislead a reasonable searcher.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 64-66 of the* Secured Transactions Guide *and 29 of the* Registry Guide.]

Article 37. Impact of a transfer of an encumbered asset

Option A

1. If an encumbered asset covered by a registered notice is transferred after the notice is registered and the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor within [a short period of time, such as 30 days, to be specified by the enacting State] after the transfer, the security right to which the initial notice relates remains effective against third parties and retains its priority.

2. If the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor after the expiration of the time period indicated in paragraph 1:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

Option B

1. If an encumbered asset covered by a registered notice is transferred after the notice is registered and the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor within [a short period of time, such as 30 days, to be specified by the enacting State] after the transfer, the security

right to which the initial notice relates remains effective against third parties and retains its priority.

2. If the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor after expiration of the time period indicated in paragraph 1, starting when the secured creditor acquires knowledge about the transfer of the encumbered asset:

(a) A security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

Option C

A security right to which the notice relates remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the registered notice.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 62 and paragraphs 78-80 of chapter IV of the* Secured Transactions Guide. *The Working Group may wish to consider making a decision as to which of the options in this article is preferable, rather than leaving the matter to each enacting State. The Working Group may also wish to consider whether it should be clarified in this article or in the Guide to Enactment that this article does not apply to outright transfers of receivables. Outright transfers of receivables fall within the scope of the Law and the transferee must register in order to make its right effective against third parties in the same way as a secured creditor that acquires a security right in receivables. The Working Group may also wish to note that the Guide to Enactment will clarify that, if a State adopts option C, it will not need to implement article 40, which includes the same rule with respect to transfers of intellectual property. The Guide to Enactment will also clarify that, in accordance with article 34, subparagraph (a), the identifier and the address of the transferee should be entered in the appropriate fields of the notice*.]

Article 38. Secured creditor's authorization

1. The person named in the initial notice as the secured creditor may register an amendment or cancellation notice relating to that initial notice at any time.

Option A

2. The registration of an amendment or cancellation notice is effective [if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law]] regardless of whether it is authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

Option B

2. The registration of an amendment or cancellation notice is effective [if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law]] regardless of whether it is authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

3. The registration of an amendment or cancellation notice which is not authorized by the person named in the initial notice as the secured creditor does not affect the

priority of the security right to which it relates as against the right of a competing claimant over which the security right had priority before the registration of the amendment or cancellation notice.

Option C

2. The registration of an amendment or cancellation notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

Option D

2. The registration of an amendment or cancellation notice is [ineffective unless] [effective if it meets the requirements of this Law [the enacting State to specify the regulation or law implementing the provisions of the Annex to this Law] and is] authorized by the person named in the initial notice as the secured creditor in writing or ordered by [the enacting State to specify a judicial or administrative authority], before or after registration.

3. The registration of an amendment or cancellation notice which is not authorized by the person named in the initial notice as the secured creditor does not affect the priority of the security right to which it relates as against the right of a competing claimant which would have priority if the registration were treated as effective and which was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, provided the competing claimant did not have knowledge that the registration of the notice was unauthorized at the time it acquired its right.

[*Note to the Working Group: The Working Group may wish to note that the matter addressed in this article was not dealt with in the* Secured Transactions Guide *but it was discussed in the* Registry Guide *(paras. 258-268). The Working Group may also wish to consider whether options C and D of this article are compatible with the* Secured Transactions Guide *(rec. 74) and the* Registry Guide *(rec. 20), according to which upon registration of a cancellation notice, information contained in a registered notice is to be removed from the public registry record and archived. The Working Group may wish to consider whether the text of this article is to cover the situation where the secured creditor named in the initial notice assigned its rights. Presumably, an amendment notice will be registered naming the assignee as the secured creditor and any subsequent amendment or cancellation notice would require the authorization of the secured creditor named in that amendment notice. The Working Group may also wish to consider whether the Guide to Enactment should clarify that the choice of a rule (option) would depend on the design of the registry system. For example, in a two-level security registry system where the user obtains a password protected account and gets a special code to register an amendment or cancellation, option A may be appropriate. The Working Group may also wish to consider whether the draft Model Law or the Guide to Enactment should identify the court or other authority that has jurisdiction for all issues arising under the draft Model Law*.]

Article 39. Compulsory registration of an amendment or cancellation notice

1. [As soon as practicable, the] [The] secured creditor must register an amendment or cancellation notice, as the case may be, if:

(a) The registration of an initial or amendment notice has not been authorized by the grantor at all or the notice contains information that exceeds the scope of the grantor's authorization;

(b) The registration of an initial or amendment notice has been authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded;

(c) The security agreement to which the registered notice relates has been revised in a way that makes some or all of the information contained in the notice incorrect or insufficient and the grantor has not otherwise authorized the registration; or

(d) The security right to which the notice relates has been extinguished by full payment or other performance of the secured obligation, or otherwise and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets to which the notice relates.

[2. If any of the conditions set out in paragraph 1 are met, the grantor is entitled to request the secured creditor in writing that the secured creditor register an amendment or cancellation notice.]

3. [If the secured creditor does not comply with the grantor's written request provided in paragraph 2 within [a short period of time, such as 15 days, to be specified by the enacting State] after receipt of the grantor's request, the] [The] grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, through [a summary judicial or administrative procedure to be specified by the enacting State].

4. The grantor is entitled to seek the registration of an amendment or cancellation notice, as the case may be, in accordance with the procedure referred to in paragraph 3 even before the expiry of the time period specified therein, provided that [the enacting State should introduce appropriate measures to protect the secured creditor].

5. An amendment or cancellation notice, as the case may be, ordered to be registered in accordance with the procedure referred to in paragraph 3 is registered by

Option A

The registrar as soon as practicable after the notice is submitted to the registry for registration with a copy of [the relevant judicial or administrative order to be specified by the enacting State] attached.

Option B

[The judicial or administrative officer to be specified by the enacting State] who ordered the notice to be registered as soon as practicable after the issuance of [the relevant judicial or administrative order to be specified by the enacting State] with a copy thereof attached.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 72 of the* Secured Transactions Guide *and 33 of the* Registry Guide. *The Working Group may wish to consider the bracketed text in paragraph 1 and paragraph 2. The Working Group may also wish to consider whether the provisions of this chapter or the Guide to Enactment should clarify which secured creditor is meant in this chapter, the secured creditor identified in a registered notice or the actual secured creditor (e.g. a transferee of a receivable that has not registered a notice with respect the transfer)*.]

B. Asset-specific rules

Article 40. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

A security right in intellectual property to which the notice relates remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered intellectual property covered by the registered notice.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, while this article is based on recommendation 244 of the* Intellectual Property Supplement*, its formulation has been aligned with the formulation of option C of article 37 of the draft Model Law. The Guide to Enactment will also explain that, if a State adopts option C of article 37, it will not need to implement this article. Finally, the Guide to Enactment will explain that this article does not address the question whether the transferee acquires the encumbered intellectual property free or subject to the security right (which is addressed in art. 43).*]

Chapter V. Priority of a security right

A. General rules

Article 41. Competing security rights

1. Subject to articles 42-51, priority among competing security rights created by the same grantor in the same encumbered asset is determined according to the order of third-party effectiveness.

[2. Priority among competing security rights created by the different grantors in the same encumbered asset is determined according to the order of third-party effectiveness[, provided that, upon transfer of the encumbered asset, the secured creditor of each grantor complies with the requirements of article 37, option A or B, to preserve the third-party effectiveness and priority of its security right].]

[3]. The priority of a security right is not affected by a change in the method by which it is made effective against third parties, provided that there is no time period during which the security right is not effective against third parties.

[4.] The priority of a security right in the proceeds of an encumbered asset is the same as the priority of the security right in that asset.

[5.] If two or more security rights in the same tangible asset continue in a mass or product as provided in article 11, they retain the same priority as the security rights in the asset had as against each other immediately before the asset became part of the mass or product.

[6.] If security rights in separate tangible assets continue in the same mass or product and each security right is effective against third parties, the secured creditors are entitled to share in the aggregate maximum value of their security rights in the mass or product according to the ratio of the value of the respective security rights.

[7.] For purposes of paragraph [6], the maximum value of a security right is the lesser of the value determined in accordance with article 11 and the amount of the secured obligation.

[8.] An acquisition security right in a separate tangible asset that continues in a mass or product and is effective against third parties has priority as against a security right granted by the same grantor in the mass or product.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that paragraph 1 of this article reflects in general terms recommendation 76 of the* Secured Transactions Guide*, and refers to third-party effectiveness (which requires creation and a third-party effectiveness act), while advance registration (i.e. before the creation of the security right or conclusion of the security agreement and thus before third-party effectiveness is achieved) is addressed in article 51. The Working Group may wish to consider paragraph 2, which has been added within square brackets to deal with priority conflicts among security rights granted by the different grantors (i.e. the grantor and successive transferees of the same encumbered asset). The Working Group may also wish to note that the Guide to Enactment will explain that paragraph 1 deals with conflicts of priority: (a) among security rights that were made effective against third parties by registration (in the security rights registry); (b) among security rights that were made effective against*

third parties otherwise than by registration (in the security rights registry); and (c) among security rights that were made effective against third parties by registration (in the security rights registry) and security rights that were made effective against third parties otherwise than by registration (in the security rights registry). The Working Group may wish to note that paragraph 2 of this article may need to be coordinated with articles 18 and 19 (see A/CN.9/WG.VI/WP.63). The Working Group may also wish to note that paragraph 4 has been revised to deal with the priority of a security right in the proceeds of an encumbered asset, rather than with the time of third-party effectiveness as recommendation 100 of the Secured Transactions Guide *on which it was originally based. The Guide to Enactment will explain that article 10 is sufficient to provide that a security right in an encumbered asset extends to its identifiable proceeds and article 17 is sufficient to provide that, once the security right in an asset is effective against third-parties, the security right in its proceeds is effective against third parties as of the same time without any further action*.]

Article 42. Rights of buyers or other transferees, lessees or licensees of an encumbered asset

1. If an encumbered asset is sold or otherwise transferred, leased or licensed and a security right in that asset is effective against third parties at the time of the sale or other transfer, lease or licence, a buyer or other transferee, lessee or licensee acquires its rights subject to the security right except as provided in this article.

2. A buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorizes a sale or other transfer of the asset free of the security right.

3. The rights of a lessee or licensee of an encumbered asset are not affected by a security right if the secured creditor authorizes the grantor to lease or license the asset unaffected by the security right.

4. A buyer of a tangible encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the conclusion of the sale agreement, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement.

5. The rights of a lessee of a tangible encumbered asset leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. Subject to the rights of a secured creditor with a security right in intellectual property in accordance with article 59, the rights of a non-exclusive licensee of an intangible encumbered asset licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.

7. If a buyer or other transferee of a tangible encumbered asset acquires its rights free of a security right, any subsequent buyer or other transferee also acquires its rights free of that security right.

8. If the rights of a lessee of a tangible encumbered asset or licensee of an intangible encumbered asset are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by that security right.

[*Note to the Working Group: The Working Group may wish to consider that the fact that exceptions to the rule in paragraph 1 of this article apply only to buyers or other transferees, lessees or licensees for value, and not to donees or other gratuitous transferees, is sufficiently clear or should be explicitly clarified in this article or in the Guide to Enactment (see* Secured Transactions Guide, *chap. V, para. 89)*.]

Article 43. Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration[3]

1. A security right in an asset that is made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any] has priority over a security right in the same asset which is made effective against third parties by any other method, regardless of the order of registration.

2. If an encumbered asset is sold or otherwise transferred, leased or licensed and, at the time of the sale or other transfer, lease or licence, a security right in that asset is effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any], the buyer or other transferee, lessee or licensee acquires its rights subject to the security right, except as provided in paragraphs 2-8 of article 42.

3. If a security right in an asset that may be made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any], has not been made effective against third parties by such registration, a buyer or other transferee acquires its rights free of the security right and a lessee's or licensee's rights are unaffected by the security right.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that recommendation 77, subparagraph (b) of the* Secured Transactions Guide *is not reflected in this article as the priority of rights registered in a specialized registry is a matter for the relevant specialized registration law*.]

Article 44. Rights of the insolvency representative

[1.] A security right that is effective against third parties under this Law at the time of the commencement of insolvency proceedings with respect to the grantor remains effective against third parties and retains the priority it had before the commencement of insolvency proceedings with respect to the grantor, unless another claim has priority pursuant to [the enacting State to specify its insolvency law].

[[2.] If a security right is effective against third parties at the time of commencement of insolvency proceedings with respect to the grantor, the secured creditor is entitled to take any action necessary to maintain the third-party effectiveness and priority the security right had before commencement of the insolvency proceedings.

[3.] An acquisition security right that is effective against third parties by the registration of a notice in the Registry after the commencement of insolvency proceedings with respect to the grantor and within the period specified in article 47, subparagraph (a)(ii), has the priority under this Law that it acquires as a result of such registration.]

[*Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article is based on recommendation 4 of the* UNCITRAL Legislative Guide on Insolvency Law *and recommendations 238 and 239 of the* Secured Transactions Guide, *paragraph 2 is based on recommendation 238 of the* Secured Transactions Guide *(see A/CN.9/830, para. 87) and paragraph 3 is intended to state explicitly what is implicit in paragraph 1 of this article and article 47 of the draft Model Law. As these recommendations refer to what the insolvency law should provide, the Working Group may wish to consider whether this article should be deleted*.]

[3] This rule is an example for the consideration of enacting States that have a specialized registration regime.

Article 45. Preferential claims

The following claims arising by operation of other law have priority over a security right that is effective against third parties but only up to [the enacting State to specify the amount for each category of claim]:

(a) […];

(b) […].[4]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) this article applies outside insolvency, while a similar rule is recommended in the* Secured Transactions Guide *with respect to preferential claims in the case of the grantor's insolvency (see rec. 239); (b) a notice with respect to preferential claims may be registered in the security rights registry; (c) in the case of enforcement, if a preferential creditor does not take over the enforcement process, its claim will have to be paid ahead of the claims of secured creditors; and (d) secured creditors should obtain representations from grantors about debts to preferential creditors and otherwise address the possible existence of such claims. The Guide to Enactment will also give examples of claims that may be listed in this article, such as claims of service providers or unpaid sellers or suppliers of goods (see A/CN.9/830, para. 89)*.]

Article 46. Rights of judgement creditors

1. Subject to the rights of acquisition secured creditors in accordance with article 49, the rights of an unsecured creditor that has obtained a judgement or provisional order ("judgement creditor") have priority over a security right, if, before the security right is made effective against third parties, the judgement creditor [the enacting State to specify the steps necessary for a judgement creditor to acquire rights in the encumbered asset or to refer to the relevant provisions of other law with respect to judgements or provisional court orders].

2. The priority of the rights of the judgement creditor referred to in paragraph 1 does not extend to credit disbursed by the secured creditor:

(a) Within [the enacting State to specify a short period of time, such as 30 days] from the time the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1; or

(b) Pursuant to an irrevocable commitment in a fixed amount or an amount to be fixed pursuant to a specified formula of the secured creditor to extend credit, if the commitment was made before the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that this article is intended to reflect recommendation 84 of the* Secured Transactions Guide. *The Guide to Enactment will also explain that, in some States, these steps involve registration of a notice in the security rights registry, seizure of assets or service of a garnishment order, matters that may be usefully clarified in the Guide to Enactment. In States that require registration of a notice with respect to these enforcement steps, judgement creditors have the same priority rights as secured creditors, that is, in other words, the general first-to-register priority rule applies. The Working Group may also wish to consider whether the judgement creditor should have priority under paragraph 2 of this article only if the secured creditor received the notification and, if so, whether this matter should be clarified in paragraph 2 of this article, another article for the receipt rule to apply throughout the draft Model Law or in the Guide to Enactment*.]

[4] The enacting State will not need this article if it does not have any preferential claims.

Article 47. Non-acquisition security rights competing with acquisition security rights[5]

Alternative A[6]

1. Except as provided in article 43 with respect to a security right that is made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any]:

(a) An acquisition security right in an asset other than inventory, consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or has acquired the asset; or

(ii) A notice with respect to the acquisition security right is registered in the Registry within [a short period of time, such as 30 days, to be specified by the enacting State] after the grantor obtains possession of or acquires the asset;

(b) An acquisition security right in inventory, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or has acquired the asset; or

(ii) Before the grantor obtains possession of or acquires the asset:

a. A notice with respect to the acquisition security right registered in the Registry; and

b. A notice that is sent by the acquisition secured creditor is received by the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right; and

(c) An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor in the same asset.

2. A notice that is sent in accordance with subparagraph 1(b)(ii)b, may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction and is sufficient only for security rights in assets of which the grantor obtains possession or which the grantor acquires within

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[5] This section includes the unitary-approach recommendations of the *Secured Transactions Guide*. If a State prefers to adopt the non-unitary approach recommendations, it may wish to consider implementing instead recommendations 187-202 of the *Secured Transactions Guide*.
[In particular, States may wish to consider doing so if they have implemented regional legislation along the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (the "Late Payment Directive"), article 9 of which, provides that "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".]

[6] A State may adopt alternative A or alternative B of this article.

[a period of time, such as five years, to be specified by the enacting State] after the notice is received.

Alternative B

Except as provided in article 43:

(a) An acquisition security right in an asset other than consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or acquires the asset; or

(ii) A notice with respect to the acquisition security right is registered in the Registry within [a short period of time, such as 30 days, to be specified by the enacting State] after the grantor obtains possession of or acquires the asset; and

(b) An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor in the same asset.

[*Note to the Working Group: The Working Group may wish to note that subparagraph (b)(ii)b of this article refers to a notice received by an earlier registered inventory financier and consider whether the receipt rule should apply to any notice sent to a person under the draft Model Law*.]

Article 48. Competing acquisition security rights

1. Subject to paragraph 2, the priority between competing acquisition security rights is determined according to article 41.

2. An acquisition security right of a seller or lessor, or a licensor of intellectual property, that was made effective against third parties within the period specified in article 47, subparagraph (a)(ii), has priority over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property.

Article 49. Acquisition security rights competing with the rights of judgement creditors

An acquisition security right that is made effective against third parties within the period specified in article 47, subparagraph (a)(ii), has priority over the rights of a judgement credit or that would otherwise have priority under article 46.

Article 50. Acquisition security rights in proceeds[7]

Alternative A

1. A security right in proceeds of an asset other than inventory, consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes, has the same priority as the acquisition security right in that asset.

2. A security right in proceeds of inventory, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for

[7] A State may adopt alternative A of this article, if it adopts alternative A of article 47, or alternative B of this article if it adopts alternative B of article 47.

sale or licence in the ordinary course of the grantor's business, has the same priority as the acquisition security right in that asset, except where the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account.

3. A security right in proceeds has the same priority as the security right in that asset, provided that the acquisition secured creditor notifies non-acquisition secured creditors that, before the proceeds arose, the acquisition secured creditor registered a notice with respect to assets of the same kind as the proceeds in the Registry.

Alternative B

Notwithstanding article 47, the priority of an acquisition security right in a tangible asset, intellectual property or rights of a licensee under a licence of intellectual property that is effective against third parties does not extend to its proceeds.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, as the draft Model Law does not deal with insolvency-related matters, with the exception of article 44, which may need to be deleted (see note to article 44), no article has been included in the draft Model Law to deal with the application of these special priority rules in the case of insolvency (rec. 186 of the* Secured Transactions Guide*). However, there is nothing in these articles to imply that insolvency law will not operate against the background of secured transactions law and thus that these provisions will not apply to acquisition security rights in the case of insolvency*.]

Article 51. Priority of a security right in the case of advance registration

The priority of a security right with respect to which a notice has been registered in the Registry before the conclusion of a security agreement or, in the case of a security right in a future asset, before the grantor acquires rights in the asset or the power to encumber it, is determined according to the time of registration.

[*Note to the Working Group: The Working Group may wish to note that this article has been included in the draft Model Law pursuant to a decision by the Working Group (see A/CN.9/830, para. 86)*.]

Article 52. Subordination

1. A person may at any time subordinate its priority under this Law in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.

[*Note to the Working Group: The Working Group may wish to consider whether a subordination agreement has to be in writing or may also be oral. The Working Group may also wish to consider whether the Guide to Enactment should explain whether, if third-party effectiveness of the security right has been established by registration of a notice, an amendment notice may be registered to reflect the new order of priority. The Working Group may also wish to note that the Guide to Enactment will explain that a subordination agreement may be between a secured creditor and a grantor, between two or more secured creditors, or between a secured creditor and another competing claimant (e.g. a judgement creditor or an insolvency representative). The Guide to Enactment will also discuss circular priority problems that may result from subordination agreements. The Working Group may wish to consider that the rule that an agreement cannot affect third parties is not enough to cover unilateral subordination and thus paragraph 2 of this article is necessary and should be retained*.]

Article 53. Future advances, future encumbered assets and maximum amount

1. Subject to the rights of judgement creditors under article 46, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

2. The priority of a security right covers all encumbered assets described in a notice registered in the Registry, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

[3. The priority of the security right is limited to the maximum amount set out in the notice registered in the Registry.][8]

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 97-99 of the* Secured Transactions Guide.]

Article 54. Irrelevance of knowledge of the existence of a security right

Knowledge of the existence of a security right on the part of a secured creditor does not affect its priority under this Law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, although the fact that knowledge of the existence of a security right does not affect priority is clear from the priority rules of the draft Model Law, it is repeated in article 54 because of the need to emphasize the importance of determining priority on the basis of objective facts rather than subjective knowledge*.]

B. Asset-specific rules

Article 55. Negotiable instruments

1. A security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority over a security right in the instrument that is made effective against third parties by registration of a notice in the Registry.

2. A buyer or other consensual transferee of an encumbered negotiable instrument acquires its rights free of the security right that is made effective against third parties by registration of a notice in the Registry if the buyer or other consensual transferee:

(a) Qualifies as a protected holder [the enacting State may wish to use any other term used in its law]; or

(b) Takes possession of the negotiable instrument and gives value [the enacting State may wish to use any other term used in its law] without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that this article is based on recommendations 101 and 102 of the* Secured Transactions Guide *and any drafting changes are intended to ensure that paragraph 1 deals only with conflicts between security rights and paragraph 2 deals with the issue whether buyers or other transferees acquires its rights free or subject to a security right (see A/CN.9/830, para. 49) The Guide to Enactment will also explain that the reference to "good faith" has been deleted as the absence of knowledge amounted essentially to good faith and the concept of good faith is used in the draft Model Law only to reflect an objective standard of conduct (see A/CN.9/830, para. 50)*.]

[8] This provision will be necessary if the enacting State implements article 6, subpara. 3(e), and 34, subpara. (e).

Article 56. Rights to payment of funds credited to a bank account

1. A security right in a right to payment of funds credited to a bank account that is made effective by the secured creditor becoming the account holder has priority over a competing security right that is made effective against third parties by any other method.

2. A security right in a right to payment of funds credited to a bank account of the depositary bank has priority over a competing security right made effective by any method other than by the secured creditor becoming the account holder.

3. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a control agreement has priority over a competing security right other than a security right of the depositary bank or a security right that is made effective against third parties by any method other than by the secured creditor becoming the account holder.

4. The order of priority among competing security rights in a right to payment of funds credited to a bank account that are made effective against third parties by control agreements is determined on the basis of the time of conclusion of the control agreements.

5. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a method other than registration of a notice in the Registry has priority over a competing security right made effective against third parties by such registration.

6. A depositary bank's right under other law to set off obligations owed to it by the grantor against the grantor's right to payment of funds credited to a bank account maintained with the depositary bank has priority as against a security right in the right to payment of funds credited to the bank account, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

7. A transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

8. Paragraph 7 does not adversely affect the rights of transferees of funds from bank accounts under [the enacting State to specify the relevant law].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that this article will apply to a priority conflict between a security right in a right to payment of funds credited to a bank account as original collateral and a security right in a right to payment of funds credited to a bank account as proceeds which, according to article 17, paragraph 1 (A/CN.9/WG.VI/WP.63), is automatically effective if the security right in the original collateral is effective against third parties*.]

Article 57. Money

1. A transferee of encumbered money acquires its rights free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of persons in possession of money under [the enacting State to specify the relevant law].

Article 58. Negotiable documents and tangible assets covered

1. Subject to paragraph 2, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by registration of a notice in the Registry or by possession of the negotiable document or the assets covered thereby.

2. Paragraph 1 does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

(a) The time that the asset became covered by the negotiable document; and

(b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time, such as 30 days, to be specified by the enacting State] from the date of the agreement.

3. A transferee of an encumbered negotiable document under [the enacting State to specify the relevant law] acquires its rights free of a security right in the negotiable document and the tangible assets covered thereby that is made effective against third parties by registration of a notice in the Registry or by possession of the documents or the assets covered thereby.

Article 59. Certain licensees of intellectual property

[Article 42, paragraph 6, does not affect any rights that a secured creditor may have [as an owner or licensor of intellectual property] under [the enacting State to specify the relevant law relating to intellectual property.]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will refer, with respect to this article, to the discussion of rights of certain licensees in the* Intellectual Property Supplement *(see paras. 193-212) and explain in particular that the ordinary course of business approach is not drawn from intellectual property law, which does not distinguish in this respect between an exclusive and non-exclusive licence but rather focuses on whether a licence is authorized or not and thus, for example, if the grantor does not have the right to grant licences, the licensee acquires its rights under the licence subject to the security right (see* Intellectual Property Supplement, *paras. 200 and 201)*.]

Article 60. Non-intermediated securities

1. A security right in certificated non-intermediated securities made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right by the same grantor in the same securities made effective against third parties by registration of a notice in the Registry.

2. A security right in uncertificated non-intermediated securities made effective against third parties by a notation of the security right or registration of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities made effective against third parties by any other method.

3. A security right in uncertificated non-intermediated securities made effective against third parties by the conclusion of a control agreement has priority over a security right in the same securities made effective against third parties by registration of a notice in the Registry.

4. Priority among security rights in uncertificated non-intermediated securities made effective against third parties by the conclusion of control agreements is determined according to the temporal order in which the control agreements were concluded.

Option A

5. This article does not adversely affect the rights of holders of non-intermediated securities under [the enacting State to specify the relevant law relating to the transfer of securities].

Option B

5. A buyer or other consensual transferee of encumbered non-intermediated securities under [the enacting State to specify the relevant law relating to the transfer of securities] acquires its rights free of the security right.

(A/CN.9/WG.VI/WP.63/Add.2) (Original: English)

Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Rights and obligations of the parties to a security agreement

A. General rules

Article 61. Source of rights and obligations of the parties

Subject to the provisions of this Law, the mutual rights and obligations of the parties to a security agreement are determined by:

(a) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein; and

(b) Any usage to which the parties to the security agreement have agreed and any practices they have established between themselves.

[*Note to the Working Group: The Working Group may wish to note that this article: (a) is based on article 11 of the* United Nations Assignment Convention *(which in turn is based on article 9 of the* United Nations Convention on Contracts for the International Sale of Goods *(*CISG*)) and recommendation 110 of the* Secured Transactions Guide*; (b) is intended to reiterate the principle that the parties to the security agreement may structure their agreement in any way they wish to meet their particular needs (as is done in articles 6 and 11 of the* United Nations Assignment Convention*, but not in articles 6 and 9 of the* CISG*); and (c) is intended to give legislative strength to trade usages agreed upon by the parties and trade practices established between them. The Working Group may also wish to note the Guide to Enactment will explain that the principle that a person challenging the effectiveness of the agreement on the ground that is inconsistent with the provisions of this article has the burden of proof.*]

Article 62. Obligation of a person in possession to preserve an encumbered asset

A [party to a security agreement] [secured creditor] in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.

[*Note to the Working Group: The Working Group may wish to consider whether the secured creditor only or also the grantor should be obliged to preserve the encumbered asset, depending on whether the secured creditor or the grantor has possession. In any case, this article should not result in preventing the grantor from selling the asset or in making it possible for the grantor to avoid this duty by relinquishing possession. Similarly, how this article would apply would depend on the particular circumstances. For example, if the cost of preserving the encumbered asset exceeds its value, the secured creditor would normally not only relinquish possession but take other steps to address the lack of security. These matters could be addressed in the Guide to Enactment. The Working Group may also wish to consider how the obligation of the secured creditor to take reasonable steps to preserve the encumbered asset would apply in the case of intangible assets. In that connection, the Working Group may wish to consider whether imposing such an obligation on a secured creditor where the encumbered assets are non-intermediated securities runs counter to the right of use of the secured creditor under article 5(1) of the Financial Collateral Directive (same issue in article 63 below).*]

Article 63. Obligation of a secured creditor to return an encumbered asset or to register a cancellation notice

If the secured obligation has been fully performed and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets, subject to any rights of subrogation in favour of the person performing the secured obligation, the security right is extinguished and the secured creditor must return an encumbered asset in its possession to the grantor, or register a cancellation notice as provided in article 39, paragraph 1.

[*Note to the Working Group: The Working Group may wish to consider whether this article or the Guide to Enactment should address the obligation of an assignee to withdraw the notification to the debtor of the receivable. The Working Group may wish to consider whether a new article should be added allowing a secured creditor to return equivalent non-intermediated securities to replace the originally encumbered non-intermediated securities (see art. 5(2) of the Financial Collateral Directive).*]

Article 64. Rights of a secured creditor with respect to an encumbered asset

1. A secured creditor in possession of an encumbered asset has the right:

(a) To be reimbursed for reasonable expenses incurred for the preservation of the asset in accordance with article 62;

(b) To make reasonable use of the asset; and

(c) To apply the monetary proceeds of the asset to the payment of the secured obligation.

2. A secured creditor has the right to inspect an encumbered asset in the possession of the grantor [at all reasonable times] [in a reasonable manner].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in paragraph 2 of this article should be deleted as the obligation of the parties to exercise their rights and perform their obligations in good faith and in a commercially reasonable manner is already addressed in article 5 dealing with the general standard of conduct (A/CN.9/WG.VI/WP.63).*]

B. Asset-specific rules

Article 65. Representations of the grantor

1. The grantor represents at the time of conclusion of the security agreement that:

(a) The grantor has the right [or the power] to create a security right in the receivable;

(b) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and

(c) The debtor of the receivable does not and will not have any defences or rights of set-off.

2. The grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.

[*Note to the Working Group: The Working Group may wish to note that the reference to contrary agreement of the parties in the chapeau of paragraph 1 and in paragraph 2 (and articles 66 and 67 below) has been deleted, as this article is not among those mandatory law provisions set out in article 4, paragraph 1 (A/CN.9/WG.VI.WP.63). The Working Group may also wish to consider whether the bracketed text in subparagraph 1 (a) should be retained as, in the case where a security right is created in a receivable in breach of a contractual limitation, formally speaking, the grantor would not have the "right" but only the "power" to create a security right*.]

Article 66. Right of the grantor or the secured creditor to notify the debtor of the receivable

1. The grantor or the secured creditor or both may send the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been sent only the secured creditor [and received by the debtor of the receivable] may send a payment instruction.

2. Notification of a security right or of a payment instruction sent in breach of an agreement referred to in paragraph 1 is not ineffective for the purposes of article 72, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

[*Note to the Working Group: The Working Group may wish to consider the bracketed wording in paragraph 1 of this article, which deals with the question whether the notification should be only sent by the secured creditor or also received by the debtor of the receivable (this issue arises also in articles 67 and 72 below)*.]

Article 67. Right of the secured creditor to payment

1. As between the grantor and the secured creditor, whether or not notification of the security right has been sent, the secured creditor is entitled:

(a) To retain the proceeds of any payment made to the secured creditor and tangible assets returned to the secured creditor in respect of the encumbered receivable;

(b) To the proceeds of any payment made to the grantor and also to any tangible assets returned to the grantor in respect of the encumbered receivable; and

(c) To the proceeds of any payment made to another person and tangible assets returned to such person in respect of the encumbered receivable, if the right of the secured creditor has priority over the right of that person.

2. The rights of the secured creditor in accordance with paragraph 1 are limited to the value of the secured obligation.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 65-67 are based on*

recommendations 114-116 of the Secured Transactions Guide, *which in turn are based articles 12-14 of the* United Nations Assignment Convention. *The changes made are intended to clarify without changing the substance of these articles*.]

Article 68. Right of the secured creditor to preserve the encumbered intellectual property

An agreement between the grantor and the secured creditor that the secured creditor is entitled to take steps to preserve encumbered intellectual property is effective.

[*Note to the Working Group: The Working Group may wish to consider that, while articles 4 (party autonomy) and 62 (obligation to preserve an encumbered asset), may be generally sufficient to ensure that the secured creditor may take steps necessary to preserve encumbered intellectual property, this article is necessary as these rights are normally rights of the intellectual property owner (e.g. to renew a patent registration or pursue infringers)*.]

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 69. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the contract giving rise to the receivable, without its consent.

2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:

(a) The currency of payment specified in the original contract; or

(b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

Article 70. Notification of a security right in a receivable

1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor and is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if a notification of the security right or a payment instruction is in the language of the contract giving rise to the receivable.

3. Notification of a security right in a receivable or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent security right in a receivable constitutes notification of all prior security rights.

Article 71. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of a security right in a receivable, it is discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of a security right in a receivable, subject to paragraphs 3-8, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single security right of the same receivable created by the same grantor,

it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment.

4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received.

5. If the debtor of the receivable receives notification of one or more subsequent security rights in the same receivable, it is discharged by paying in accordance with the notification of the last of such subsequent security rights.

6. If the debtor of the receivable receives notification of the security right in a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this article as if the debtor of the receivable had not received the notification.

7. If the debtor of the receivable receives a notification as provided in paragraph 6 and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

8. If the debtor of the receivable receives notification of a security right in a receivable from a subsequent secured creditor, it is entitled to request the secured creditor to provide within a reasonable period of time adequate proof that the security right created by the initial grantor to the initial secured creditor and any intermediate security right have been created and, unless the secured creditor does so, the debtor of the receivable is discharged by paying in accordance with this article as if it had not received notification of the security right.

9. Adequate proof of a security right referred to in paragraph 8 includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.

10. This article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Article 72. Defences and rights of set-off of the debtor of the receivable

1. Unless otherwise agreed in accordance with article 73, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:

(a) All defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security right had not been created and the claim were made by the grantor; and

(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

2. Notwithstanding paragraph 1, the debtor of the receivable may not raise as a defence or right of set-off against the grantor breach of an agreement referred to in article 12, paragraph 2, limiting in any way the initial or subsequent grantor's right to create the security right.

Article 73. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off referred to in article 72.

2. The agreement referred to in paragraph 1 may be modified only by an agreement in a writing signed by the debtor of the receivable [and its effectiveness against the secured creditor is subject to article 72, paragraph 2].

3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed sentence in paragraph 2 is necessary.*]

Article 74. Modification of the original contract

1. An agreement concluded before notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

2. An agreement concluded after notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is ineffective as against the secured creditor unless:

(a) The secured creditor consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable secured creditor would consent to the modification.

3. Paragraphs 1 and 2 do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.

Article 75. Recovery of payments made by the debtor of the receivable

1. The failure of the grantor to perform the contract giving rise to a receivable does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

2. Paragraph 1 does not affect any rights that the debtor of the receivable may have against the grantor under other law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 69-75 of the draft Model Law are based on recommendations 117-123 of the* Secured Transactions Guide, *which in turn are based on articles 15-21 of the* United Nations Assignment Convention. *Paragraph 1 of this article is based on recommendation 123 of the* Secured Transactions Guide *and article 21 of the* United Nations Assignment Convention. *Paragraph 2 has been added to clarify that this article is not intended to deprive the debtor of the receivable of any rights it might have under other law to seek recovery of payments from its contractual partner, that is, the grantor/assignor*.]

B. Negotiable instruments

Article 76. Rights as against the obligor under a negotiable instrument

The rights of a secured creditor that has a security right in a negotiable instrument as against the person obligated on the negotiable instrument are subject to [the enacting State to specify the relevant law relating to negotiable instruments].

[*Note to the Working Group: The Working Group may wish to adopt in this article the same wording it may adopt in article 60, in paragraph 5.*]

C. Rights to payment of funds credited to a bank account

Article 77. Rights and obligations of the depositary bank

1. The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the bank with which that bank

account is maintained without its consent, nor does it obligate the depositary bank to provide any information about that bank account to third parties.

2. Any rights of set-off that the depositary bank may have under [the enacting State to specify relevant law relating to rights of set-off] are not affected by any security right that the bank may have in a right to payment of funds credited to a bank account maintained with the bank.

D. Negotiable documents and tangible assets covered by a negotiable document

Article 78. Rights as against the issuer of a negotiable document

The rights of a secured creditor that has a security right in a negotiable document as against the issuer of the document or any other person obligated on the document are subject to [the enacting State to specify the relevant law relating to negotiable documents].

E. Non-intermediated securities

Article 79. Rights as against the issuer of a non-intermediated security

The rights of a secured creditor that has a security right in non-intermediated securities as against the issuer of the securities are subject to [the enacting State to specify the relevant law relating to the obligations of the issuer of non-intermediated securities].

Chapter VII. Enforcement of a security right

A. General rules

Article 80. Post-default rights

1. After default, the grantor is entitled to exercise one or more of the following rights:

(a) Pay or otherwise perform in full the secured obligation and obtain a release from the security right of all encumbered assets;

(b) Apply to a court or other authority for relief if the secured creditor is not complying with its obligations under the provisions of this Law;

(c) Propose to the secured creditor, or reject the proposal of the secured creditor, that the secured creditor acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

(d) Exercise any other right provided in the security agreement or any other law.

2. After default, the secured creditor is entitled to exercise one or more of the following rights:

(a) Obtain possession of a tangible encumbered asset;

(b) Sell or otherwise dispose of, lease or license an encumbered asset;

[(c) In the case of a security right in all assets of a grantor, sell or otherwise dispose of the grantor's business as a going concern;]

[(d)] Propose that it acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

[(e)] Exercise any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.

3. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.

4. Subject to article 5, the exercise of a post-default right with respect to an encumbered asset does not prevent the exercise of a post-default right with respect to the secured obligation, and vice versa.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 139, 141, 143 and 144 of the* Secured Transactions Guide. *The Working Group may also wish to consider subparagraph 2 (c), which introduces a new right of a secured creditor with a security right in all assets of a grantor. This new provision, which appears within square brackets for the consideration of the Working Group, is intended to state explicitly what was implicit in recommendation 132 of the* Secured Transactions Guide *(the thrust of which is included in article 5 of the draft Model Law), namely that, if it is commercially reasonable (e.g. maximizes the value of the grantor's estate), a secured creditor with a security right in all assets of a business may sell the business as a going concern, rather than sell the encumbered assets one by one. The Working Group may wish to note that the Guide to Enactment will clarify that this section deals with post-default rights applicable to security rights in all types of asset, while the asset-specific section refers to additional post-default rights applicable to security rights in specific types of asset, such as receivables*.]

Article 81. Waiver of post-default rights

1. The grantor and any other person that owes payment or other performance of the secured obligation may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter before default.

2. The secured creditor may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article is necessary in view of article 5 dealing with party autonomy (A/CN.9/WG.VI/WP.63).*]

Article 82. Judicial and extrajudicial methods of exercising post-default rights

1. The secured creditor may exercise its post-default rights judicially or extrajudicially.

2. Judicial exercise of the secured creditor's post-default rights is subject to [the civil procedure rules to be specified by the enacting State].

3. Extrajudicial exercise of the secured creditor's post-default rights is subject to articles 5 and 87-90.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will include wording along the lines of recommendation 138 of the* Secured Transactions Guide *to emphasize the importance of expeditious judicial proceedings and extrajudicial proceedings for the availability and the cost of credit*.]

Article 83. Judicial or other official relief of the grantor for non-compliance by the secured creditor

The debtor, the grantor or any other interested person is entitled to court relief [or other official relief to be specified by the enacting State], including [the enacting State to specify expeditious court proceedings], if the secured creditor fails to comply with its obligations when enforcing the security right judicially or extrajudicially in accordance with article 82.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that "other official relief to be specified by the enacting State" may include relief by an arbitral tribunal, chamber of commerce or*

notary public, if there is an agreement to that effect between the grantor and the secured creditor that is enforceable under the law of the enacting State. The Guide to Enactment: (a) will also explain that in such a case the law of the enacting State must provide protection for the rights of persons, who are not party to such an agreement, in the encumbered assets; (b) discuss types of expedited judicial proceeding; and (c) give examples of "interested persons", such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets. In particular with respect to resolution of enforcement-related disputes by arbitration, the Guide to Enactment will also make reference to the need for the law to ensure that third-party creditors are notified (e.g. before an extra-judicial sale takes place under article 88) and given an opportunity to assert their rights (e.g. their right to take over enforcement under article 85 or be paid from the proceeds of a sale according to their priority rank under this law under article 90).]

Article 84. Grantor's right of redemption

1. The debtor, the grantor or any other interested person is entitled to redeem the encumbered asset by paying or otherwise performing the secured obligation in full, including payment of interest and the cost of enforcement.

2. This redemption right may be exercised until the asset is sold or otherwise disposed of, leased or licensed, acquired or collected by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

Article 85. Right of higher-ranking secured creditor to take over enforcement

1. Notwithstanding commencement of enforcement by another competing claimant creditor, a secured creditor whose security right has priority over that of the enforcing creditor is entitled to take over the enforcement process at any time before the asset is sold or otherwise disposed of, leased, licensed, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

2. The right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any method available to a secured creditor under this Law.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article may be deleted, as it seems to be stating the obvious, namely that a secured creditor taking over the enforcement process has the same post-default rights that any secured creditor has*.]

Article 86. Secured creditor's right to possession

After default, the secured creditor is entitled to possession of a tangible encumbered asset.

Article 87. Extrajudicial repossession of encumbered assets

[1.] The secured creditor is entitled to obtain possession of an encumbered asset without applying to a court or other authority if all of the following conditions are satisfied:

(a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court or other authority;

(b) The secured creditor has given the grantor and any person in possession of the encumbered asset [or owing payment or other performance of the secured obligation] notice of default and of the secured creditor's intent to obtain possession without applying to a court or other authority within [a short period of time, such as 15 days, to be specified by the enacting State] days after notice is [sent] [received]; and

(c) At the time the secured creditor seeks to obtain possession of the encumbered asset, the grantor or any other person in possession of the encumbered asset does not object.

[2. The notice referred to in subparagraph 1 (b) need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (b) (the first of which is intended to ensure that notice is given to any person owing payment of the secured obligation, and the last of which is intended to raise the issue whether it is sufficient if the notice is sent or whether it is required that the notice be received) and paragraph 2 of this article (which is intended to reflect the rule in article 89, paragraph 6, according to which no notice is required if the encumbered assets are perishable goods)*.]

Article 88. Extrajudicial disposition of encumbered assets

1. After default, a secured creditor is entitled to sell or otherwise dispose of, lease, or license an encumbered asset without applying to a court or other authority.

2. Subject to article 5, a secured creditor that exercises the right referred to in paragraph 1 may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

Article 89. Advance notice of extrajudicial disposition of encumbered assets

1. After default, the secured creditor must give notice of its intention to sell or otherwise dispose of, lease or license an encumbered asset in accordance with article 88.

2. The notice referred to in paragraph 1 must be given to:

(a) The grantor and any debtor;

(b) Any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time when the enforcing secured creditor took possession of the asset.

3. The notice must be given at least [a short period of time, such as 15 days, to be specified by the enacting State] before extrajudicial disposition takes place and must contain a description of the encumbered assets, a statement of the amount required to satisfy the secured obligation including interest and the cost of enforcement, a reference to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84 and a statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, the time and place of a public disposition, and the manner of the intended disposition.

4. The notice must be in a language that is reasonably expected to inform its recipients about its contents.

5. It is sufficient if the notice to the grantor is in the language of the security agreement.

6. The notice need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.

[*Note to the Working Group: The Working Group may wish to note that no text has been included in this article to reflect recommendation 150 of the* Secured

Transactions Guide, *as that recommendation is aspirational and does not fit in model law but could be discussed in the commentary*.]

Article 90. Distribution of proceeds of disposition of encumbered assets

1. In the case of extrajudicial disposition of an encumbered asset:

(a) [Subject to the rights of holders of preferential claims under article 45,] the enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation;

(b) Except as provided in subparagraph 1 (c), the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claim, to the extent of the amount of that claim, and remit any balance remaining to the grantor; and

(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.

2. Distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made pursuant to [the civil procedure rules to be specified by the enacting State], but in accordance with the priority provisions of this Law.

3. A debtor remains liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (a), which raises the issue of payments to preferential creditors that have to be paid ahead of secured creditors. Alternatively, the net proceeds may be defined as proceeds after the payment of any preferential claims or left to the civil procedure rules of the enacting State referred to in paragraph 2. The Working Group may wish to consider whether a new article should be added in the draft Model Law to deal with liability for damages for non-compliance with enforcement obligations (see Secured Transactions Guide, rec. 136). Such a new article could read along the following lines: 1. If a person violates its obligations under the provisions of this chapter, the person to whom the obligation is owed has a right to recover loss or damage resulting from that violation. 2. If the secured obligation arises from a transaction entered into by an individual for personal, family or household purposes, and the secured creditor violates its obligations under the provisions of this chapter, the person to whom the obligation is owed is deemed to have suffered damages not less than [the enacting State to specify a minimum amount in regulations or a method for determining a minimum amount in its law].*]

Article 91. Acquisition of encumbered assets in satisfaction of the secured obligation

1. After default, the secured creditor may propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

2. The proposal must be sent to:

(a) The grantor, the debtor and any other person that owes payment or other performance of the secured obligation, including a guarantor;

(b) Any person with rights in the encumbered asset that has notified in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time such as 15 days to be

specified by the enacting State] before the proposal is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time the secured creditor took possession.

3. The proposal must specify the amount owed as of the date the proposal is sent, including interest and the cost of enforcement, and the amount of the obligation that is proposed to be satisfied by acquiring the encumbered asset, describe the encumbered asset, refer to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84, and state the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor may acquire the encumbered asset as provided in paragraph 1, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time such as 15 days to be specified by the enacting State] after the proposal is [sent to] [received by] the grantor.

5. In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction, affirmative consent by each addressee of the proposal is necessary.

6. The grantor may make such a proposal and if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5.

[*Note to the Working Group: The Working Group may wish to note that, a* contrario*, paragraph 5 of this article means that, in the case of full satisfaction of the secured obligation, affirmative consent by each addressee of the proposal is not needed; it is sufficient if each addressee does not object in a timely fashion (see* Secured Transactions Guide*, ch. VIII, para. 70). The Working Group may wish to consider this matter and whether it should be addressed in this article explicitly or only discussed in the Guide to Enactment*.]

Article 92. Rights acquired through judicial disposition of encumbered assets

If a secured creditor sells or otherwise disposes of, leases or licenses, an encumbered asset through a judicial [or other officially administered] process, the transferee, lessee or licensee acquires the asset [the enacting State to specify whether the transferee, lessee or licensee acquires its rights subject to or free of any rights].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will give examples of other officially administered processes (e.g. before a chamber of commerce or notary public)*.]

Article 93. Rights acquired through extrajudicial disposition of encumbered assets

1. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a court or other authority, a person that acquires the grantor's right in the asset acquires its rights free of the rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the security right of the enforcing secured creditor, but subject to the rights that have priority over the security right of the enforcing secured creditor.

2. If a secured creditor leases or licenses an encumbered asset without applying to a court or other authority, a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against rights that have priority over the right of the enforcing secured creditor.

3. If the secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in accordance with the provisions of this chapter, a buyer or other transferee, lessee, or licensee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 2, provided that [it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person and this lack of knowledge was not the result of reckless behaviour].

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in paragraph 3, which is intended to implement the decision of the Working Group that the words "good faith acquirer, lessee or licensee" used in a previous version of paragraph 3 of this article (based on recommendation 163 of the* Secured Transactions Guide) *should be replaced by wording that would neither require only knowledge of non-compliance with a rule on enforcement nor go as far as to require collusion between the secured creditor and the acquirer (see A/CN.9/802, para. 31).*]

B. Asset-specific rules

Article 94. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security

1. After default, a secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security is also entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, depositary bank or issuer of the non-intermediated securities.

2. The secured creditor may exercise the right provided for in paragraph 1 even before default but with the agreement of the grantor.

3. A secured creditor exercising the right referred to in paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the encumbered asset.

4. If a security right in a right to funds credited to a bank account has been made effective against third parties by registration of a notice, the secured creditor is entitled to collect or otherwise enforce its security only pursuant to a court order, unless the depositary bank agrees otherwise.

5. The right of the secured creditor to collect under paragraphs 1 to 4 is subject to articles 68-75.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that the asset-specific post-default rules are applicable to security rights in specific types of asset, while the general post-default rules apply to security rights in all types of asset. The Working Group may wish to note that the Guide to Enactment will clarify that, once inventory is converted to a receivable, a receivable is paid into a bank account, a check is issued on the basis of that account and new inventory is bought, depending on the form of the encumbered asset during the enforcement of the security right, different rules might apply to the enforcement of that security right. The Working Group may wish to consider the application of this article to checks and bills of exchange. The Working Group may also wish to consider whether the conditions set out in article 87 for the out-of-court repossession of an encumbered tangible asset should also apply to out-of-court collection of a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security. In this regard, the Working Group may wish to note that, unless the conditions for the out-of-court collection of payment under such an asset are specifically regulated and the grantor's right to due process is specifically protected, the out-of-court collection may run counter to constitutional guarantees of due process.*]

(A/CN.9/WG.VI/WP.63/Add.3) (Original: English)

Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws[1]

A. General rules

Article 95. Law applicable to the rights and obligations of the grantor and the secured creditor

The law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will make reference to international texts dealing with the law applicable to contractual rights and obligations, including the Hague Principles on Choice of Law in International Contracts*.]

Article 96. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 4 and article 110, the law applicable to the creation, effectiveness against third parties, and priority of a security right in a tangible asset is the law of the State in which the asset is located.

2. The law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset of a type ordinarily used in more than one State is the law of the State in which the grantor is located.

3. If a notice with respect to security right in a tangible asset is registered in [the enacting State to specify a specialized registry, if any] or the security right is noted on [the enacting State to specify a title certificate, if any], the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State under whose authority the registry is maintained or the certificate is issued.

4. The law applicable to the priority of a security right in a tangible asset made effective against third parties by possession of a negotiable document as against a competing security right made effective against third parties by another method is the law of the State in which the document is located.

5. A security right in a tangible asset (other than a negotiable instrument) in transit or to be exported from the State in which it is located at the time of the creation of the security right may be created and made effective against third parties under the law of the State of the location of the asset at the time of creation as provided in paragraph 1, or under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short period of time, such as 30 days, to be specified by the enacting State] after the time of creation of the security right as provided in paragraph 1.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that paragraph 3 has been revised to ensure that a law other than the law of the location of the asset will apply only if a notice with respect to a security right has been actually registered in a specialized registry or a notation with respect to the security right has been made on a title certificate, and not only if, as a matter of principle, a notice could be registered or a notation made, as provided in recommendation 205 of the* Secured Transactions Guide, *on which this provision is based. The Guide to Enactment will also explain that paragraph 3 will lead to the application of the law other than the tangible asset if the asset is located in one State and a notice is registered in a specialized registry maintained under the authority of another State or a security right is noted on a certificate issued in another State. With respect to the relevant time for determining location, the Guide to Enactment will also include a cross-reference to article 102. The Working Group may*

[1] The enacting State may implement the conflict-of-laws provisions as part of the secured transactions law (at the beginning or at the end of it) or as part of a separate law (civil code or other law).

wish to consider whether paragraph 5, which is based on recommendation 207 of the Secured Transactions Guide*, is a conflict-of-laws rule rather than a substantive rule of the receiving State like article 21 (see A/CN.9/WG.VI/WP.63).*]

Article 97. Law applicable to a security right in an intangible asset

[Subject to articles 98 and 107-110, the] [The] law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.

Article 98. Law applicable to a security right in receivables arising from a sale, lease or security agreement relating to immovable property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in a receivable arising from a sale, lease or security agreement relating to immovable property is the law of the State in which the grantor is located.

2. Notwithstanding paragraph 1, the law applicable to the priority of a security right in a receivable as against the right of a competing claimant that is registered in an immovable property registry is the law of the State under whose authority the registry is maintained, provided that under that law, registration is relevant to the priority of the security right in the receivable.

Article 99. Law applicable to the enforcement of a security right

The law applicable to issues relating to the enforcement of a security right:

(a) In a tangible asset is the law of the State where [the relevant act of] enforcement takes place; and

(b) In an intangible asset is the law applicable to the priority of the security right.

[*Note to the Working Group: The Working Group may wish to consider the text within square brackets in subparagraph (a), which is intended to clarify that enforcement may involve several acts, such as a notice of default, notice of extrajudicial repossession and disposition of an encumbered asset, disposition, and distributions of proceeds of disposition (see A/CN.9/802, para. 105). Alternatively, the matter may be discussed in the Guide to Enactment With respect to subparagraph (b), the Working Group may wish to consider whether its application together with article 102 leads to the appropriate result. In this regard, the Working Group may wish to note that, under a combined application of subparagraph (b) and article 102, if the grantor moved since the security right was created and, thus the law applicable to priority changed, the rights of the secured creditor on default would also change, even if the secured creditor did not consent to the move or even did not know about it. The Working Group may wish to note that, if the grantor moved during the enforcement process and only at that time a priority issue arose, the law applicable would again change (see also note to article 102)*.]

Article 100. Law applicable to a security right in proceeds

1. The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original encumbered asset from which the proceeds arose.

2. The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in an asset of the same kind as the proceeds.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, in accordance with paragraph 1, which is based on recommendation 215, subparagraph (a), of the* Secured Transactions Guide*, if the original encumbered asset is inventory, which is sold and a receivable is generated, which in turn is paid into a bank account, the law applicable to the creation of the*

security right in the bank account as proceeds of the original encumbered inventory would be the law of the location of the inventory. In that case, the law applicable to the third-party effectiveness and priority of the security right would be the law applicable to bank accounts (see article 107 below).]

Article 101. Meaning of "location" of the grantor

1. For the purposes of the provisions of this chapter, the grantor is located in the State in which it has its place of business.

2. If the grantor has a place of business in more than one State, the grantor's place of business is that place where the central administration of the grantor is exercised.

3. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

Article 102. Relevant time for determining location

1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer, for creation issues, to the location at the time of the putative creation of the security right and, for third-party effectiveness and priority issues, to the location at the time the issue arises.

2. If the rights of all competing claimants in an encumbered asset are created and made effective against third parties before a change in location of the asset or the grantor, references in the provisions of this chapter to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change in location.

[*Note to the Working Group: The Working Group may wish to consider whether article 102 should provide guidance with respect to the relevant time for determining location for the purpose of enforcement issues. For example, the relevant time for determining location of the encumbered asset or the grantor for enforcement issues should be the time of the location of the asset or the grantor at the time of putative creation*.]

Article 103. Exclusion of *renvoi*

A reference in the provisions of this chapter to "the law" of another State as the law applicable to an issue refers to the law in force in that State other than its conflict-of-laws provisions.

Article 104. Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law applicable under the provisions of this chapter.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude the application of a provision of the law applicable under the provisions of this chapter if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable under the provisions of this chapter.

5. Paragraphs 1 and 3 do not permit the application of the provisions of the law of the forum to the third-party effectiveness and priority of a security right.

[*Note to the Working Group: The Working Group may wish to note that articles 103 and 104 of the draft Model Law have been revised to be aligned with*

articles 8 and 11 of the Hague Principles on Choice of Law in International Contracts (see A/CN.9/802, para. 106).]

Article 105. Impact of commencement of insolvency proceedings on the law applicable

1. Subject to paragraph 2, the commencement of insolvency proceedings does not displace the provisions of this chapter.

2. The rule in paragraph 1 is subject to the effects on such issues of the application of the insolvency law of the State in which insolvency proceedings are commenced to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds.

[*Note to the Working Group: The Working Group may wish to consider whether this article should be retained, in view of the fact that the draft Model Law does not deal with substantive insolvency issues (or the law applicable in the case of the grantor's insolvency)*.]

B. Asset-specific rules

Article 106. Law applicable to the relationship of third-party obligors and secured creditors

The law applicable to a receivable, negotiable instrument or negotiable document also is the law applicable to:

(a) The relationship between the debtor of the receivable and the secured creditor, and the relationship between the obligor under a negotiable instrument and the holder of a security right in the instrument;

(b) The conditions under which a security right in a receivable, a negotiable instrument or negotiable document may be invoked against the debtor of the receivable, the obligor under a negotiable instrument or the issuer of a negotiable document, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor of the receivable, the obligor under the negotiable instrument or the issuer of the negotiable document; and

(c) Whether the obligations of the debtor of the receivable, the obligor under the negotiable instrument or the issuer of the negotiable document have been discharged.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 217 of the* Secured Transactions Guide.]

Article 107. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 108, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as rights and duties of the depositary bank with respect to the security right, is

Alternative A[2]

The law of the State in which the bank with which the account is maintained has its place of business.

2. If the bank has places of business in more than one State, reference should be made to the place where the branch maintaining the account is located.

[2] A State may adopt alternative A or alternative B of this article.

Alternative B

The law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.

2. The law of the State determined pursuant to paragraph 1 applies only if the depositary bank has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary].

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 210 of the* Secured Transactions Guide.]

Article 108. Law applicable to the third-party effectiveness of a security right in specified types of asset by registration

If the State in which the grantor is located recognizes registration as a method for achieving effectiveness against third parties of a security right in a negotiable instrument or a right to payment of funds credited to a bank account, the law of that State is the law applicable to the issue whether third-party effectiveness has been achieved by registration under the laws of that State.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 211 of the* Secured Transactions Guide. *The Working Group may wish to consider whether this rule should apply even if a notice with respect to a security right has not been actually registered in the general security rights registry of the grantor's State. The Working Group may also wish to consider whether this rule should apply only to negotiable instruments and rights to payment of funds credited to bank accounts or also to other types of asset (e.g. tangible assets, the third-party effectiveness of a security right in which would be determined by the location of the instrument)*.]

Article 109. Law applicable to a security right in intellectual property

1. 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.

2. 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.

3. 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.

Article 110. Law applicable to a security right in non-intermediated securities

Option A

1. Subject to paragraph 2:

(a) The law applicable to the creation, third-party effectiveness and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located; and

(b) The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which enforcement takes place.

2. The law applicable to the effectiveness of a security right in certificated non-intermediated securities against the issuer is the law of the State under which the issuer is constituted.

3. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in uncertificated non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option B

The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option C

1. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated equity securities, as well as to its effectiveness against the issuer, in the law under which the issuer is constituted.

2. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated debt securities, as well as to its effectiveness against the issuer, is the law governing the securities.

[*Note to the Working Group: The Working Group may wish to consider the above options. Option A provides separate rules for certificated and uncertificated securities and, with respect to certificated securities, different rules for the various matters (which are the same rules as those applicable to tangible assets; see articles 96, para. 1 and 99, subpara. (a)). In particular with respect to certificated securities, this approach has the advantage of flexibility but also the disadvantage of uncertainty as it may lead to inconsistencies and overlaps. For example, some creation, third-party effectiveness and enforcement issues may be viewed as issues relating to the effectiveness against the issuer (this is the reason why paragraph 1 is subject to paragraph 2) and thus may be referred to the law of the issuer's constitution rather than the law of the certificate's location. In addition, by referring the creation, third-party effectiveness and priority of a security right in certificated securities to the law of the certificate's location, option A makes it possible for the secured creditor to manipulate the law applicable by moving the certificate from one country to another. With respect to uncertificated securities, option A has the advantage that only one rule would apply to all issues and refer to one and the same law (which is though different from the law applicable to other types of intangible asset). It has, however, the disadvantage that it does not draw a distinction between equity securities (with respect to which the law of the State of the constitution of the issuer is appropriate) and debt securities (with respect to which, the law of the State of the constitution of the issuer may not be always appropriate).*

Option B provides one single rule that would apply to both certificated and uncertificated securities and to all issues, namely, the effectiveness against the issuer, the creation, the effectiveness against third parties, the priority and the enforcement of a security right. This approach eliminates the risks of inconsistencies or overlaps between the law of the State of issuer's constitution (which should always apply to the effectiveness against the issuer) and another law that the conflict-of-laws rules of the forum may designate for other issues (e.g. the law of the location of the certificate for the priority of a security right in certificated non-intermediated securities). In addition, referring to only one law for all issues provides greater certainty, as some matters (e.g. limitations on the transfer of securities under corporate law) may be viewed as being relevant not only to the effectiveness of the security right against the issuer but also to its creation and its enforcement. Moreover, by not referring to the law of the location of the certificate with respect to certificated securities, option B prevents the secured creditor from manipulating the designation of the applicable law by moving the certificate from one country to another. The disadvantage of option B, however, is that it departs from the lex situs rule for the creation, effectiveness against third parties and priority of a security right in certificated securities. Thus, the

conflict-of-laws rules for certificated securities would then be different from those applicable to other intangible assets that have been assimilated for certain purposes to tangible assets (under article 100, the creation, effectiveness against third parties and priority of a security right in negotiable documents or instruments are governed by the law of the location of the document or instrument).

Option C retains option B for equity securities (whether certificated or uncertificated) but refers to a different rule for debt securities (whether certificated or uncertificated), that is, the law of the State governing the securities to govern all issues. The justification for that approach is that, if the issuer has selected a law other than the law of the State of its constitution as the governing law of the securities, that other law should also be the law applicable to security right matters. The benefit of this approach is that one single law would govern all matters relating to debt securities, which would avoid the risks of inconsistencies arising from different laws being applicable to the various issues. The disadvantage of option C, however, is that the distinction between equity securities and debt securities may be blurred in certain circumstances (e.g. convertible securities). In addition, while option C focusses on the contractual nature of debt securities, which are analogous to receivables in that respect, it would not be consistent with the conflict-of-laws rule on the creation, effectiveness against third parties and priority of a security right in a receivable (under article 97, in the case of a receivable, the law of the State in which the grantor is located would govern those issues). As debt securities are receivables in a generic sense (monetary obligations), then a variation of option C would be to apply to debt securities the same conflict-of-laws rule as for receivables.]

Article 111. Law applicable in the case of a multi-unit State

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3, references to the law of a multi-unit State are to the law of the relevant territorial unit and, to the extent applicable in that unit, to the law of the multi-unit State itself.

2. The relevant territorial unit referred to in paragraph 1 is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If the applicable law is that of a multi-unit State or one of its territorial units, the internal conflict-of-laws provisions in force in the multi-unit State or territorial unit determine whether the substantive provisions of law of the multi-unit State or of a particular territorial unit of the multi-unit State apply.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 3, which is drawn from recommendation 225 of the* Secured Transactions Guide *means that: (a) the conflict-of-laws rules in the relevant State or unit determine whether to apply the laws of the State (as a whole) or only a territorial unit; or (b) the conflict-of-laws rules in the State or territorial unit determine whether to apply the law of a different territorial unit in the State. If it is the latter, it means that the forum State is required to master the internal conflict-of-laws rules of the State of the location of the grantor or the encumbered asset; so, it is a semi-renvoi. The Working Group may wish to note that in this regard the* Assignment Convention *allows a declaration by States as to the determination of the applicable priority rule as between various territorial units, but here there would be no declaration and the forum would be on its own to figure things out under the conflict-of-laws rules of another State.*]

IX. Transition

Article 112. General

1. This Law comes into force on [a date to be specified by the enacting State] [[…] months after a date to be specified by the enacting State].

2. This Law [repeals] [abrogates] [overrides] [modifies] the [laws to be specified by the enacting State].

3. For the purposes of this chapter:

(a) "Prior law" refers to the law of the enacting State that was in force immediately prior to the date on which this Law comes into force; and

(b) "Prior security right" means a right created before the date on which this Law comes into force that is a security right within the scope of this Law and to which this Law would have applied if it had been in force at the time when it was created.

4. This Law applies to all security rights within its scope, including prior security rights, except to the extent that this chapter provides for the continued application of prior law.

Article 113. Actions commenced before the date on which the Law comes into force

Prior law applies to:

(a) Disputes with regard to the post-default rights and obligations of the grantor and the secured creditor that are the subject of court or arbitral tribunal proceedings that were commenced before the date referred to in article 112, paragraph 1; and

(b) Disputes with regard to the post-default rights and obligations of the grantor and the secured creditor that are the subject of out-of-court proceedings if [notice of default] [notice of extrajudicial repossession] [notice of extrajudicial sale] [distribution of proceeds] [the step to be specified by the enacting State] has occurred before the date referred to in article 112, paragraph 1.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that what step exactly (e.g. the submission of a claim) constitutes commencement, in the case of judicial or arbitral proceedings, will be a matter of civil procedure law. The Working Group may wish to consider whether what exactly constitutes commencement in the case of extrajudicial proceedings should be addressed in the draft Model Law or left to each enacting State*.]

Article 114. Creation of a security right

1. Prior law determines whether a security right was created before the date referred to in article 112, paragraph 1.

2. A prior security right remains effective between the parties under this Law [notwithstanding that it does not comply with the creation requirements of this Law].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text is necessary*.]

Article 115. Third-party effectiveness of a security right

1. A prior security right that was made effective against third parties before the date referred to in article 117, paragraph 1, in accordance with prior law continued to be effective against third parties under this Law until the earlier of:

(a) The time it would have ceased to be effective against third parties under prior law; and

(b) The expiration of [a transition period, such as six months, to be specified by the enacting State] after the date on which this Law enters into force.

2. [A security agreement [or other method of creation under the old law to be specified by the enacting State] entered into before the date referred to in article 112, paragraph 1, is sufficient as authorization for registration after the date referred to in article 112, paragraph 1.]

3. If the third-party effectiveness requirements of this Law are satisfied before third-party effectiveness would have ceased in accordance with paragraph 1, the prior security right continues to be effective against third parties for the purposes of this Law.

4. After the period of time referred to in paragraph 1, third-party effectiveness of a security right lapses and may be re-established if the third-party effectiveness requirements of this Law are satisfied.

Article 116. Priority of a security right

1. The time to be used for determining priority of a prior security right is the time it was made effective against third parties or, in the case of advance registration, became the subject of a registered notice under the prior law.

2. The priority of a prior security right is determined by prior law if:

(a) The security right and the rights of all competing claimants arose before the date referred to in article 112, paragraph 1; and

(b) The priority status of none of these rights has changed since the date referred to in article 112, paragraph 1.

3. The priority status of a security right has changed only if:

(a) It was effective against third parties on the date referred to in article 112, paragraph 1, in accordance with article 115, paragraph 1, and ceased to be effective against third parties as provided in article 115, paragraph 4; or

(b) It was not effective against third parties under prior law on the date referred to in article 112, paragraph 1, and was made effective against third parties under this Law.

(A/CN.9/WG.VI/WP.63/Add.4) (Original: English)

Note by the Secretariat on a Draft Model Law on Secured Transactions

ADDENDUM

Contents

Annex I. Regulation[1]

Article 1. Appointment of the registrar

The [the name of the appropriate executive or ministerial authority to be specified by the enacting State] is authorized to appoint and dismiss the registrar, and determine the registrar's duties.

Article 2. Public access

1. To submit a security right notice, a person must:

(a) Use the appropriate notice form prescribed by the [registrar] [Regulation];

(b) Identify itself in the manner prescribed by the registrar; and

(c) Have paid or made arrangements to pay to the satisfaction of the registrar any fee prescribed by the [registrar] [Regulation].

2. To submit a search request to the registry, a person must:

(a) Use the search request form prescribed by the [registrar] [Regulation]; and

(b) Have paid or made arrangements to pay to the satisfaction of the registrar, any fee prescribed by the [registrar] [Regulation].

3. The reason for the rejection of access is communicated by the registrar to the registrant or searcher as soon as practicable.

[*Note to the Working Group: The Working Group may wish to consider whether both alternatives in square brackets in subparagraphs 1 (a) and (c), and 2 (a) and (b) of this article may be retained to leave it to each enacting State to determine whether these matters should be left to the registrar or settled in the Regulation. The Working Group may also wish to note that the term "registrar" is used instead of the term "registry" as the latter term is defined as a system and not as a person (the registrar may need to be defined to include the registry staff).*]

Article 3. Rejection of a security right notice or search request

1. The registration of a security right notice is rejected by the registrar if no information is entered in one or more of the required designated fields or if the information provided is not legible.

2. A search request is rejected by the registrar if no information is entered in at least one of the fields designated for entering a search criterion or if the information is not legible.

3. The reason for the rejection is communicated by the registrar to the registrant or searcher as soon as practicable.

Article 4. No additional conditions to be imposed on access to registry services

1. Information about the registrant's identity is obtained from the registrant and maintained by the registrar in accordance with article 2, subparagraph 1 (b), of this Annex, but verification of that information is not required.

2. Except as provided in article 3 of this Annex, the registrar does not reject the registration or conduct any scrutiny of the content of a notice submitted to the registry for registration.

[*Note to the Working Group: The Working Group may also wish to consider whether in this or other article of the draft Model Law, or in the Guide to Enactment, it should be indicated that, while the date and time of registration is maintained in the public record (see A/CN.9/WG.VI/WP.63/Add.1, art. 31, subpara. 2), the identity of the registrant is maintained in a part of the record of the registry that is not public.*

[1] Depending on its legislative policy and drafting technique, each enacting State may enact registry-related rules in its secured transactions law, a different law or in administrative rules.

The Working Group may also wish to consider whether the identity of the registrant should be maintained in the archives after the notice to which it relates has been cancelled, and thus removed from the public registry record and archived.]

Article 5. Organization of information in registered notices

The registry record is organized so that:

(a) A unique registration number is assigned to a registered initial security right notice and all registered amendment and cancellation security right notices that contain that number are associated with the initial notice in the registry record;

(b) The identifier and address of the person identified as the secured creditor in multiple registered security right notices can be amended by the registration of a single global amendment notice; and

(c) The registration of an amendment or cancellation security right notice does not result in the deletion or modification of information contained in any associated registered notices.

[*Note to the Working Group: The Working Group may wish to consider whether a definition of the term "registration number" should be included in article 2 of the draft Model Law (A/CN.9/WG.VI/WP.63).*]

Article 6. Integrity of information in registered security right notices

1. Except as provided in articles 8 and 9 of this Annex, information contained in registered security right notices may not be amended or removed by the registrar from the registry record.

2. The information contained in registered security right notices is backed up so as to allow reconstruction in the event of loss or damage.

[Article 7. Obligation to send a copy of a registered security right notice

1. A copy of the information in a registered security right notice, indicating the date and time when the registration of the notice became effective and the registration number, is sent by the registrar to the person identified in the notice as the secured creditor at the address set forth in the notice, as soon as practicable after its registration.

2. Within [a short period of time, such as 10 days, to be specified by the enacting State] after the person identified in a registered security right notice as the secured creditor has received a copy of the notice in accordance with paragraph 1, that person must send a copy of the notice to the person identified therein as the grantor at the address set forth therein, or if that person knows that the address has changed, at the most recent address known to that person or an address reasonably available to that person.]

[*Note to the Working Group: The Working Group may wish to note that, in view of the decision of the Working Group at its 24th session (see A/CN.9/796, para. 87), this article appears within square brackets for further consideration. The Working Group may also wish to consider whether this article should be split in two, one dealing with the obligation of the registrar and the other dealing with the obligation of the secured creditor. The Working Group may also wish to note that paragraph 2 of this article includes changes aimed at simplifying the rule contained in recommendation 18 of the Registry Guide, on which it is based.*]

Article 8. Removal of information from the public registry record and archival

1. Information in a registered security right notice is removed from the public registry record upon the expiry of the period of effectiveness of the notice in accordance with article 32 or upon registration of a cancellation notice in accordance with article 39.

2. Information removed from the public registry record in accordance with paragraph 1 is archived for a period of at least [a long period of time, such as, for example, 20 years, to be specified by the enacting State] in a manner that enables the information to be retrieved by the registry in accordance with article 33.

Article 9. Language in which information in a security right notice must be expressed

The information contained in a notice must be expressed in [the language or languages to be specified by the enacting State] and in the character set determined and publicized by the registry.

[*Note to the Working Group: The Working Group may wish to consider whether this article should be retained or deleted and the matter addressed therein discussed in the Guide to Enactment. If the Working Group decides that this article should be retained, it may wish to consider its placement in the draft Model Law (for example, whether it should follow article 8 of this Annex, which provides that a notice that is illegible is rejected). Alternatively, the Working Group may wish to consider whether article 36 of the draft Model Law (A/CN.9/WG.VI/WP.63/Add.1) and/or article 15 of the Annex should provide that where the information in a registered notice is not expressed in the required language or languages the registration of the notice is ineffective or ineffective if it would seriously mislead a reasonable searcher.*]

[Article 10. Correction of errors by the registrar

1. If the registrar makes an error or omission in entering into the registry record the information contained in a paper security right notice or erroneously removes from the registry record all or part of the information contained in a registered security right notice, promptly after discovering the need for the correction or restoration, the registrar must

Option A

register a notice to correct the error or omission, or restore the erroneously removed information and send a copy of the notice to the secured creditor.

Option B

inform the secured creditor identified in the registered notice so as to enable the secured creditor to register a notice to correct the error or omission or restore the erroneously removed information.

2. If a security right notice referred to in paragraph 1 is registered, it is effective

Option A

as of the time it becomes accessible to searchers of the registry record.

Option B

as of the time it becomes accessible to searchers of the registry record, except that the security right to which the notice relates retains the priority it would otherwise have under the Law over the right of a competing claimant that acquired its right prior to the registrar's error or omission or the registrar's erroneous removal of the information.

Option C

as if the error or omission had never been made or the information had never been erroneously removed.

Option D

as if the error or omission had never been made or the information had never been erroneously removed, except that the security right to which the notice relates is

subordinate to the right of a competing claimant that would have priority if the notice were treated as effective only from the time of its registration and that acquired its right in reliance on a search of the registry record made before the notice was registered, provided the competing claimant did not have actual knowledge of the error or omission or the erroneous removal of the information at the time it acquired its right.]

[*Note to the Working Group: The Working Group may wish to note that the options set out in this article parallel, with the necessary modifications, the options set out in article 38 of the draft Model Law, dealing with the effectiveness of amendment or cancellation notices not authorized by the secured creditor. Accordingly, the Guide to Enactment will explain that an enacting State should take into account both articles in determining which option to adopt to ensure that the options selected are compatible.*]

[Article 11. Liability of the registrar

Alternative A

Any liability that the registrar may have under other law for loss or damage caused to a person by an error or omission in the administration or operation of the registry is limited to:

(a) An error or omission in a search result issued to a searcher or in a copy of a registered security right notice sent to the secured creditor [up to a maximum amount to be specified by the enacting State]; and

(b) Loss or damage caused by an error or omission on the part of the registrar in entering or failing to enter into the registry record the information contained in a paper security right notice or in erroneously removing all or part of the information contained in a registered security right notice from the registry record [up to a maximum amount to be specified by the enacting State].

Alternative B

The registrar is not liable for loss or damage caused to a person by an error or omission in the administration or operation of the registry.]

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that: (a) alternative A of this article is intended to leave the issue of the liability of the registrar (or the enacting State) for loss or damage caused by an error or omission in the administration or operation of the registry to other law of the enacting State and, if liability is foreseen by that other law, to limit that liability to the types of errors or omissions listed in alternative A (which may be covered by a compensation fund that the registrar or the enacting State may wish to establish and pay from the registry fees); and (b) alternative B is intended to exclude any liability of the registry (or the enacting State) for errors or omissions in relation to the administration or operation of the registry. The Working Group may further wish to note that alternative A does not contemplate any liability for the alleged failure of the registry system to properly or completely enter information directly submitted by a registrant electronically since it would be impossible to prove that this was due to the fault of the system as opposed to the registrant's own error or omission but that the secured creditor is still protected since the registrar is obligated to send a copy of the registered notice to the secured creditor who can then verify the accuracy and completeness of the information. Finally, the enacting State may also wish to address liability for false or misleading information provided by the registrar or registry staff to registrants or searchers.*]

Article 12. Determination of grantor identifier

1. Where the grantor is a natural person:

(a) [Subject to subparagraph 1(c), the] [The] identifier of the grantor is the name of the grantor, as it appears in [the official documents on the basis of which the

grantor's name should be determined and the hierarchy among those official documents, to be specified by the enacting State];

(b) [The enacting State should specify the various components of the secured creditor's name that must be entered in the prescribed registry notice form and provide the designated fields for each component in the notice]; and

(c) [The enacting State should address the possibility that the name of the grantor as it appears in the relevant document or source specified in subparagraph 1(a) may have been changed in accordance with applicable change of name law and whether, in this eventuality, it should specify that the new name of the grantor should be entered.]

2. Where the grantor is a legal person, the grantor identifier is the name of the grantor that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

3. [The enacting State should specify whether additional information must be entered in the designated field of the prescribed registry notice form in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 13. Determination of secured creditor identifier

1. Where the secured creditor is a natural person, the secured creditor identifier is the name of the secured creditor as it appears in [the official documents on the basis of which the secured creditor's name should be determined and the hierarchy among those official documents, to be specified by the enacting State].

2. Where the secured creditor is a legal person, the secured creditor identifier is the name of the secured creditor that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

3. [The enacting State should specify whether additional information must be entered in the designated field of the prescribed registry notice form in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 14. Sufficient description of encumbered assets

1. A generic description that refers to all of the grantor's movable assets within a generic category includes all of the grantor's present and future assets within that category.

2. A generic description that refers to all of the grantor's movable assets includes all of the grantor's present and future movable assets.

Article 15. Impact of errors in required information

1. The secured creditor is responsible for ensuring that the information in a security right notice is set forth in the correct designated field in the notice and that the information is accurate and complete, and conforms to the requirements of the Law and the Regulation.

2. An incorrect statement of the grantor identifier in a security right notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.

3. Except as provided in paragraph 4, an incorrect or insufficient statement of the information required in a security right notice other than the grantor's identifier does not render the registration of the notice ineffective unless the error would seriously mislead a reasonable searcher.

[4. An incorrect statement in a security right notice with respect to the period of effectiveness of registration[2] or the maximum amount for which the security right may be enforced,[3] does not render the notice ineffective[, except to the extent it seriously misled third parties that relied on the information set out on the notice].]

5. An incorrect statement of the grantor identifier in a security right notice does not render the registration of the notice ineffective with respect to other grantors correctly identified in the notice.

6. An insufficient description of an encumbered asset in a security right notice does not render the registration of the notice ineffective with respect to other encumbered assets sufficiently described.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text at the end of paragraph 4 (which is drawn from rec. 29, subpara. (c) of the Registry Guide, which in turn is drawn from rec. 66 of the Secured Transactions Guide) should be retained. Whether the period of effectiveness or maximum amount indicated in the notice is greater or lower than it was actually intended, the notice is effective and third parties relying on the notice as it appears on the registry record are protected (this point may be clarified in the Guide to Enactment or in para. 4 of this article). In this respect, the Working Group may wish to note that the Guide to Enactment will explain that: (a) the reference to a reasonable searcher in paragraph 3 means that the "seriously misleading test" in this paragraph is objective (that is, it is not necessary for a competing claimant to establish that it was actually misled as a result of the error in order for an error that would be seriously misleading from the perspective of a reasonable searcher to render a registration ineffective); and (b) the reference in paragraph 4 to parties that actually relied to their detriment on an erroneously stated registration period or maximum amount in a registered notice means that the "seriously misleading test" in this paragraph is subjective (that is, a third party challenging the notice needs to establish that it was actually misled as a result of the error; see Secured Transactions Guide, chap. IV, paras. 84 and 96).*]

Article 16. Secured creditor's authorization

In the case of a change in the secured creditor identified in a registered initial security right notice, the new secured creditor may register an amendment or cancellation security right notice relating to the initial notice at any time after the change.

Article 17. Information required in an amendment security right notice

1. An amendment security right notice must contain the following items of information in the designated field for each item:

(a) The unique registration number assigned by the registry to the initial notice to which the amendment relates; and

(b) The information to be added, deleted or changed, as the case may be.

2. An amendment notice may relate to one or more than one item of information in a notice.

Article 18. Global amendment of secured creditor information

Option A

A person may register a single global amendment security right notice to amend its identifier and address in all registered security right notices in which it is identified as the secured creditor.

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[2] This provision will be necessary, if the enacting State implements option B or C of article 32.
[3] This provision will be necessary, if the enacting State implements article 34, subparagraph (e).

Option B

A person may request the registrar to register a single global amendment security right notice to amend its identifier and address in all registered security right notices in which it is identified as the secured creditor.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that, if an enacting State adopts the first option stated in this article, it will need to establish special access procedures to enable a person to identify all notices in which it is named as the secured creditor and to register a global amendment notice, since the identifier of the secured creditor is not a search criterion generally available to the public for searching the public registry record.*]

Article 19. Information required in a cancellation security right notice

A cancellation security right notice must contain in the designated field the unique registration number assigned by the registry to the initial notice to which the cancellation relates.

Article 20. Compulsory registration of an amendment or cancellation security right notice

1. In a case falling within subparagraphs 1(b) to (d) of article 39, the secured creditor may charge the grantor any fee agreed between them for registering an amendment or cancellation security right notice.

2. Notwithstanding paragraph 1, no fee or expense may be charged or accepted by the secured creditor for complying with a written request from the grantor sent in accordance with paragraph 2 of article 39.

Article 21. Search criteria

A search of the public registry record may be conducted according to:

(a) The identifier of the grantor; or

(b) The registration number assigned to the registered security right notice.

Article 22. Search results

Option A

1. A search result indicates the date and time when the search was performed and either lists any registered security right notices that contain information that matches the search criterion provided by the searcher exactly and sets forth the registration history and all the information contained in these notices, or indicates that no registered notice contains information that exactly matches the search criterion provided by the searcher.

Option B

1. A search result indicates the date and time when the search was performed and either lists any registered security right notices that contain information that matches the search criterion provided by the searcher exactly and closely, and sets forth the registration history and all the information contained in these notices, or indicates that no registered notice contains information that exactly or closely matches the search criterion provided by the searcher.

2. An official search certificate indicating the search result may be issued by the registrar at the request of the searcher.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of option B of this article should apply only to searches against the grantor identifier and not the registration number if the enacting State implements a close-match system. There does not seem to be a commercial or practical reason for close matches with respect to registration numbers. The Working Group may also*

wish to note that the Guide to Enactment will explain that if an enacting State chooses to implement the type of close match system contemplated by alternative B, the rules used by the registry for determining what constitutes a close match should be specified and publicized.]

Article 23. Fees for the services of the registry

Option A

1. The following fees are payable for the services of the registry:

(a) Registration of a security right notice:

(i) Paper: […];

(ii) Electronic: […];

(b) Searches:

(i) Paper: […];

(ii) Electronic: […];

(c) Certificates:

(i) Paper: […];

(ii) Electronic: […];

2. The registry may enter into an agreement with a person to establish a registry user account to facilitate the payment of fees.

Option B

The [administrative authority to be specified by the enacting State] may determine the fees and methods of payment for the services of the registry by decree.

Option C

The following services of the registry are free of charge [types of service to be specified by the enacting State.]

VII. FUTURE WORK

A. Note by the Secretariat on planned and possible future work

(A/CN.9/841)

[Original: English]

Contents

I. Introduction

A. Background

1. At its forty-sixth session, in 2013, the Commission agreed that it should reserve time for discussion of UNCITRAL's future work as a separate topic at each Commission session (A/68/17, para. 310). [1] Consequently, the Commission considered planned and possible future work for UNCITRAL at its forty-seventh session, taking into consideration issues raised in notes by the Secretariat on planned and possible future work (A/CN.9/807 and A/CN.9/816), together with other documents referred to therein.

2. This Note has been prepared to enable the Commission's consideration of future work at this forty-eighth session. It considers all UNCITRAL's main activities, both legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (see para. 4 below for references to documents that explain the activities concerned). This Note also covers mandated and possible future subject-areas.

3. The Commission may wish to consider issues of planned and possible future work taking into account, in addition to those documents, progress reports of its Working

[1] The Commission may wish to recall that at its forty-fourth session, in 2011, it requested the Secretariat to prepare a note on strategic planning, with possible options and an assessment of their financial implications (*Report of the Commission's Forty-fourth Session, Supplement No. 17* (A/66/17), para. 343). At its forty-fifth session, in 2012, the Commission considered the resulting note by the Secretariat ("A strategic direction for UNCITRAL", A/CN.9/752 and Add.1) submitted pursuant to that request, and agreed to consider and provide further guidance on UNCITRAL's strategic direction at its forty-sixth session, requesting the Secretariat to reserve sufficient time to allow for a detailed discussion at that time (A/67/17, para. 231).

Groups and the Secretariat and conclusions reached at its forty-seventh session under this agenda item (A/69/17, paras. 241-266). When setting UNCITRAL's work programme for the forthcoming period, the Commission may also wish to recall its decision at the forty-sixth session that it would normally plan for the period to the next Commission session, but that some longer-term indicative planning (for a three-to-five year period) may also be appropriate (A/68/17, para. 305).

4. The Commission may wish to have reference to the following documents, to which this Note also refers:

(a) Documents for the current Commission session, [2] available at www.uncitral.org/uncitral/commission/sessions/48th.html, and including:

A/CN.9/825 and A/CN.9/831 — Report of Working Group I (MSMEs) on the work of its 23rd and 24th sessions (Vienna, 17-21 November 2014; New York, 13-17 April 2015);

A/CN.9/826 and A/CN.9/832 — Report of Working Group II (Arbitration and Conciliation) on the work of its 61st and 62nd sessions (Vienna, 15-19 September 2014; New York, 2-6 February 2015);

A/CN.9/827 and A/CN.9/833 — Report of Working Group III (Online Dispute Resolution) on the work of its 30th and 31st sessions (Vienna, 20-24 October 2014; New York, 9-13 February 2015);

A/CN.9/828 and A/CN.9/834 — Report of Working Group IV (Electronic Commerce) on the work of its 50th and 51st sessions (Vienna, 10-14 November 2014; New York, 18-22 May 2015);

A/CN.9/829 and A/CN.9/835 — Report of Working Group V (Insolvency Law) on the work of its 46th and 47th sessions (Vienna, 15-19 December 2014; New York, 26-29 May 2015);

A/CN.9/830 and A/CN.9/836 — Report of Working Group VI (Security Interests) on the work of its 26th and 27th sessions (Vienna, 8-12 December 2014; New York, 20-24 April 2015);

A/CN.9/839 — Bibliography of recent writings related to UNCITRAL's work;

A/CN.9/843 — Status of conventions and model laws, Note by the Secretariat;

A/CN.9/837 and A/CN.9/845 — Technical assistance activities undertaken since the Commission's forty-seventh session and technical assistance resources, Note by the Secretariat, including UNCITRAL publications, the UNCITRAL website, and a survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) since the Commission's forty-seventh session;

A/CN.9/838 — Coordination activities: Brief survey of the activities undertaken by the Secretariat since the Commission's forty-seventh session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat;

A/CN.9/840 — Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests);

A/CN.9/849 — Note by the Secretariat on current trends in the adoption and use of the United Nations Sales Convention, and its complementary texts;

A/CN.9/850 — A note by the Secretariat on possible future work in procurement and infrastructure development;

[2] Titles and symbols of the documents referred to are current as at the date of submission of this Note, but are subject to change.

A/CN.9/851 — Report on developments with respect to the insolvency treatment of financial contracts and a framework for sovereign insolvency, Note by the Secretariat;

(b) Background documents from Commission's forty-fifth to forty-seventh sessions, available at:

www.uncitral.org/uncitral/commission/sessions/45th.html,
www.uncitral.org/uncitral/commission/sessions/46th.html, and
www.uncitral.org/uncitral/commission/sessions/47th.html, including:

A/CN.9/752 and Add.1 — A strategic direction for UNCITRAL, Note by the Secretariat (for the forty-fifth session);

A/67/17 — Report of the Commission's forty-fifth session (especially paras. 228-232);

A/CN.9/774 — Planned and possible future work, Note by the Secretariat (for the forty-sixth session);

A/68/17 — Report of the Commission's forty-sixth session (especially paras. 292-332);

A/CN.9/807 — Planned and possible future work — Part I, Note by the Secretariat (for the forty-seventh session);

A/CN.9/816 — Planned and possible future work — Part II, Note by the Secretariat (for the forty-seventh session);

A/69/17 — Report of the Commission's forty-seventh session (especially paras. 241-260).

II. Summary of current activities

A. Legislative work

5. The table below sets out current legislative development, and the envisaged completion dates of the texts concerned.

Table 1
Current legislative activities (Section III.A below considers future legislative activities)

Topic	*Report and document references*	*Envisaged completion date*
MSMEs (WG I)		
Preparation of legal standards on simplified business incorporation and registration	A/CN.9/825 and A/CN.9/831	Estimated 2017 or beyond
Arbitration (WG II)		
- Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	A/CN.9/826 and A/CN.9/832	To be completed during the session of the Commission
- Enforcement of settlement agreements resulting from international conciliation/mediation		To be considered by the Commission as an item for work – If confirmed, estimated 2016 or beyond
Electronic commerce (WG IV)		
Electronic transferable records	A/CN.9/828 and A/CN.9/834	Estimated 2016 or beyond

Topic	*Report and document references*	*Envisaged completion date*
Insolvency (WG V)		
(i) Model law or legislative provisions on selected international issues, including jurisdiction, access and recognition in the cross-border insolvency of enterprise groups	A/CN.9/691 A/65/17, para. 259(a) A/CN.9/798 A/CN.9/803 A/CN.9/829	Ongoing
(ii) Obligations of directors of enterprise groups members in the period approaching insolvency	A/CN.9/691 A/65/17, para. 259(b) A/CN.9/829	Estimated 2016
(iii) Model law or model legislative provisions on recognition and enforcement of insolvency-related judgements	A/69/17, para. 155 A/CN.9/829	Ongoing
(iv) Study on the insolvency of large and complex financial institutions	A/CN.9/691 A/65/17, para. 260 A/CN.9/763	Ongoing
(v) Convention on selected international insolvency issues – informal consultations	A/69/17, para. 158	Ongoing
Security Interests (WG VI)		
Preparation of a draft Model Law on Secured Transactions	A/CN.9/830 and A/CN.9/836	To be confirmed

6. As the table indicates, the revised version of the UNCITRAL Notes on Organizing Arbitral Proceedings will be presented for consideration at this Commission session.

7. At its forty-seventh session, the Commission requested that the progress and status of the work of each Working Group, as set out in their reports, be collated and presented to the Commission so as to allow context of each Working Group's suggestions for future work and for prioritization among existing and new topics to be clearer (A/69/17, para. 253). A brief summary of the progress of each Working Group is accordingly presented below:

(a) *MSMEs (WG I)*: Working Group I continued its work in accordance with the mandate received from the Commission on reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycle, in particular, in developing economies, beginning with a focus on the legal questions surrounding the simplification of incorporation. Following a discussion of issues in respect of best practices in business registration, and presentations by the Corporate Registers Forum, the European Business Register and the European Commerce Register's Forum, the Working Group agreed to continue its work on business registration by further exploring the relevant key principles. To that end, the Working Group intends to consider at a future session materials further developing those principles (A/CN.9/825, para 46). In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group heard a presentation by the secretariat of the Financial Action Task Force (FATF) on its standard-setting activity to combat money-laundering, terrorist financing and other illicit activity, as well as presentations by States on possible alternative legislative models to assist MSMEs. The Working Group then further explored the legal questions surrounding the simplification of incorporation by considering the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations in this regard at its twenty-fourth session (A/CN.9/825, para. 79).

At its twenty-fourth session (13-17 April 2015), the Working Group resumed its deliberations on the framework of issues in working paper A/CN.9/WG.I/WP.86. Although it has not yet decided what form the legal text in this regard will take, the Working Group also considered the issues as outlined in the first six draft articles in

the draft model law on a simplified business entity in A/CN.9/WG.I/WP.89. Additional provisions of the draft model law will be taken up at the next session of the Working Group, in priority of those most relevant to the simplest of the business entities, and following consideration of materials further developing best practices in business registration.

(b) *Arbitration (WG II)*: Working Group II has undertaken the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings at its sixty-first and sixty-second sessions and, in accordance with the mandate that work on the topic should be completed within one or two sessions, the Working Group will submit the revised version of the Notes for consideration by the Commission at its current session (A/CN.9/832, para. 12).

(c) *Online dispute resolution (WG III)*: The Working Group continued its work to develop Track 1 of the procedural rules for the resolution of online disputes. At its thirtieth session, the Working Group took into consideration the importance of different outcomes (including arbitration) and different enforcement mechanisms. It considered these issues with particular reference to developing countries and those facing post-conflict situations, and issues of consumer protection. Progress was made on the draft text of this Track of the Rules, also on the basis of proposals submitted during the session. However, it was clear by the end of that session that fundamental differences remained between States that allowed binding pre-dispute agreements to arbitrate and those that did not, despite the Working Group's strenuous efforts to come to consensus. It was observed that further progress would require the draft Rules to reflect the Working Group's conclusions on this matter (A.CN/9/827, para. 15).

At its thirty-first session, the Working Group continued to seek consensus on a single text for the draft rules, again on the basis of various proposals made during the session. However, as no consensus was reached, it was said that the Commission should terminate the mandate of the Working Group. It was added that this would be in accordance with the Commission's view that UNCITRAL's scarce resources should be deployed in undertaking legislative development on those topics on which it was likely that consensus could be achieved. Other delegations expressed the view that the Working Group should continue with its efforts to find a consensus on the third proposal. It was noted by these delegations that there were new elements for a consensus that had been identified and that could form the basis of a positive outcome for the Working Group.

The Working Group was also invited to engage in informal consultations before this forty-eighth Commission session, with a view to enhancing constructive discussion on the above matters (A.CN/9/833, paras. 16 and 17). It is anticipated that an oral report thereon will be presented to the Commission.

(d) *Electronic commerce (WG IV)*: At its fiftieth (Vienna, 10-14 November 2014) and fifty-first sessions (New York, 18-22 May 2015) the Working Group continued its work on the preparation of draft provisions on electronic transferable records. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30).

(e) *Insolvency (WG V)*: At its forty-sixth session, the Working Group continued its deliberations on (a) the key elements of a possible legislative text to facilitate the cross-border insolvency of multinational enterprise groups; (b) the first draft of recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency and agreed that those recommendations should form an additional section of part four of the UNCITRAL Legislative Guide on Insolvency Law. The Working Group also commenced its discussion on the elements to be included in a model law or set of model legislative

provisions on the recognition and enforcement of insolvency-related judgements, reaching initial agreement on some of the characteristics required for judgements to be included in the new instrument, a number of the grounds to refuse recognition of such judgements, and relevant articles from the Model Law on Cross-Border Insolvency that might need to be included. The Working Group agreed that the text should be a free-standing instrument, rather than an additional part of the existing Model Law.

At its forty-seventh session, the Working Group continued its deliberations on these three topics on the basis of a draft legislative text providing a recognition regime for the cross-border insolvency of multinational enterprise group members; a further revision of the draft recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency, together with the first draft of the accompanying commentary; and the first draft of a model legislative text on the recognition and enforcement of insolvency-related judgements.

(f) *Security Interests (WG VI)*: The Working Group continued its work on the preparation of a draft Model Law on Secured Transactions. At its twenty-sixth and twenty-seventh sessions, the Working Group considered notes by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add. 1-3, and A/CN.9/WG.VI/WP.63 and Add. 1-4) and adopted the substance of several articles of the draft Model Law. For a summary of the deliberations at the twenty-seventh session, the Commission may wish to refer to the report of WG VI (A/CN.9/836), which is to be issued after the submission of this Note.

B. Other activities

8. The reports available to the forty-eighth session of the Commission describing UNCITRAL's current activities in the provision of technical assistance, promoting ways to ensure a uniform interpretation and application of UNCITRAL texts; identifying the status of and work of other bodies in promoting its texts, coordination and cooperation with other relevant bodies and promoting the rule of law at the national and international levels ("support activities") are as follows:

A/CN.9/839 — Bibliography of recent writings related to UNCITRAL's work;

A/CN.9/837 and A/CN.9/845 — Technical assistance to law reform and technical assistance resources, including UNCITRAL publications, the UNCITRAL website and UNCITRAL regional presence: survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP);

A/CN.9/843 — Status of conventions and model laws, Note by the Secretariat;

A/CN.9/838 — Coordination activities: Brief survey of the activities undertaken by the Secretariat since the Commission's forty-seventh session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat;

A/CN.9/840 — Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests);

Oral report — Role of UNCITRAL in promoting the rule of law at the national and international levels.

III. Summary of mandated and possible activities after July 2015

A. Legislative work

1. Mandated future work

9. The phrase "mandated future work" refers to planned legislative development, i.e. work that the Commission has remitted to a working group.

10. In accordance with the mandate that the Working Group should consider the issue of enforcement of international settlement agreements resulting from conciliation/mediation proceedings and should report to the Commission at its session, in 2015, on the feasibility and possible form of work in that area, the Working Group considered that topic at its sixty-second session. After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, paras. 57-59). The Commission will also have before it comments by States on their legislative framework on enforcement of settlement agreements resulting from mediation in document A/CN.9/846 and its addenda.

11. At its forty-seventh session (A/69/17, para. 156), the Commission mandated Working Group V to take up work, as its next priority, on the insolvency treatment of MSMEs. It is anticipated that that work will begin when Working Group V has completed one of the topics on its current work program (item (ii) in the table above on legislative work i.e. obligations of directors of enterprise groups companies in the period approaching insolvency, is likely to be completed by the end of 2015).

2. Possible future work

12. The phrase "possible future work" refers to legislative development proposed to the Commission, but in respect of which it has not yet provided a mandate to a working group.

13. The Commission has before it proposals for possible future work on the subject areas set out in Table 2 below. The final column of the table identifies areas in which a proposal may involve issues of another subject-area.

Table 2
Summary of possible future legislative activity

Subject area	*Proposal*	*Document reference*	*Other relevant subject areas*
Arbitration	Concurrent proceedings in the field of investment arbitration	Para. 15 (a) below A/CN.9/848	–
Electronic commerce	Identity management, mobile payments, electronic single windows and cloud computing	Para. 13 (b) below	MSMEs (mobile payments)
Insolvency			
	Insolvency treatment of financial contracts	Para. 15 (c) below, A/CN.9/851	
International contract law	Broad proposal on international contract law	Para. 15 (d) below	–
MSMEs	Development of legal standards on dispute resolution, access to financial services, access to credit, and insolvency	Para. 15 (e) below A/68/17, paras. 316-321	Arbitration and conciliation, Insolvency, Security Interests

Subject area	*Proposal*	*Document reference*	*Other relevant subject areas*
Online Dispute Resolution	Preparation of guidelines for ODR providers and platforms	Para. 7(c) above	
Procurement and Infrastructure Development	Development of standards on suspension and debarment in public procurement	Para. 15 (g) below A/CN.9/851	Arbitration/conciliation, MSMEs, Insolvency, Security Interests
	Revisions to the UNCITRAL texts on PFIP[3]		
Security Interests	Guide to Enactment of the Model Law on Secured Transactions Contractual Guide on Secured Transactions – Uniform law text on intellectual property licensing	Para. 15 (h) below	Contract law, Intellectual property law

14. Further proposals may be made to the Commission at its current session, recommending legislative mandates for other subject-areas, from States and/or international organizations.

15. Details of the proposals outlined in Table 2 are found in the documents referred to therein, and also in following paragraphs:

(a) *Arbitration*: At its forty-sixth session, in 2013, the Commission identified that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.[4] At its forty-seventh session, in 2014, the Commission considered whether to mandate its Working Group II (Arbitration and Conciliation) to undertake work in the field of concurrent proceedings in investment treaty arbitration, based on a note prepared by the Secretariat, briefly outlining the issues at stake (A/CN.9/816, Addendum). At that session, it was said that concurrent proceedings were posing serious issues in the field of treaty-based investor-State arbitration, and that future work in that area could be beneficial. In response, it was suggested that UNCITRAL ought not to limit its work to parallel proceedings arising in the context of investment arbitration, but rather, in light of the implication such work might have on other types of arbitration practice, to extend that work to commercial arbitration as well. It was also said, however, that parallel proceedings in investment arbitration, and those in commercial arbitration, raised different issues and might need to be considered separately.[5] After discussion, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area. That work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration. The Commission requested the Secretariat to report to the Commission at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[6] Document A/CN.9/848 provides further details on the proposals in this subject-area.

(b) *Electronic commerce*: The Commission agreed at its forty-fourth session that the extension of the mandate of Working Group IV to identity management and mobile commerce as discrete subjects (as opposed to their incidental relation to electronic transferable records) would be further considered at a future session (A/66/17, para. 239). At that session, the Commission welcomed the ongoing cooperation between the Secretariat and other relevant organizations on legal issues relating to electronic single window facilities and asked the Secretariat to contribute

[3] The UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects (2000) and the Model Legislative Provisions on Privately-Financed Infrastructure Projects (2003), available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 129-133 and 311.

[5] Ibid., para. 127.

[6] Ibid., para. 130.

as appropriate, with a view to discussing relevant matters at the working group level when the progress of joint work offered a sufficient level of detail (Ibid., para. 240).

Work on electronic single window facilities and paperless trade is being carried out, in particular, in the framework of the implementation of UN ESCAP resolutions 68/3 and 70/6. At its forty-seventh session, the Commission took note of a proposal by the Government of Canada with regard to legal issues on cloud computing (A/69/17, para. 146). At that session, the Commission requested the Secretariat to compile information on cloud computing, identity management, use of mobile devices in electronic commerce and single window facilities and to report at a future session of the Commission (Ibid., para. 150).

(c) *Insolvency*: At its forty-seventh session, the Commission noted the possibility of undertaking further work on financial contracts to ensure that the relevant provisions of the UNCITRAL Legislative Guide on Insolvency Law remained consistent with current best practice and related international instruments.[7] The Commission decided that as Working Group V already had a rather full agenda, certain matters, including that topic, did not require consideration as immediate priorities. Nevertheless, the secretariat was requested to monitor developments at other international organizations. At its forty-eighth session, the Commission will have before it a note by the secretariat reporting on recent developments of relevance to the provisions of the Legislative Guide on financial contracts and their continued use as a global standard (A/CN.9/851).

(d) *International contract law*: At its forty-sixth session, the Commission requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention" or "CISG"),[8] to take place on a date after the forty-seventh Commission session, to be held in 2014. The Commission agreed that the scope of that colloquium could include some of the issues raised by a proposal submitted at its forty-fifth session (A/68/17, para. 315). That request was reiterated at the Commission's forty-seventh session (A/69/17, para. 255). Accordingly, a panel discussion will be organized by the Secretariat at the forty-eighth Commission session with participation of experts in the field of international sale of goods law. Moreover, since the forty-seventh Commission session, the Secretariat has coordinated or contributed to a series of regional and national events on the United Nations Sales Convention with a view to compiling background information for that panel discussion. At its forty-eighth session the Commission will have before it a note (A/CN.9/849) on current trends in the adoption and use of the United Nations Sales Convention, and its complementary texts, i.e. the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980 (Vienna); and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005); as well as related non-UNCITRAL texts.

(e) *MSMEs*: At its forty-sixth session, in 2013, the Commission took note of five broad areas in which the participants at the 16-18 January 2013 Colloquium on the topic had recommended work should begin on addressing the legal aspects of an enabling legal environment for MSMEs. The five topics were: simplified business start-up and operation procedures, alternative or online dispute resolution, access to financial services, access to credit and insolvency. The Commission agreed that work aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle should be commenced, and that such work should start with a focus on the legal questions surrounding the simplification of incorporation (A/68/17, paras. 317 and 321). That mandate was reaffirmed by the Commission at its forty-seventh session, in 2014 (A/68/17, para. 134). A mandate with respect to insolvency has already been given to WG V, as referred to in para. 9 above.

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[7] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 157.

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

(f) *Online dispute resolution*: see paragraph 7(c) above.

(g) *Procurement and infrastructure development*: At its forty-seventh session, the Commission considered a report from a Colloquium held in Vienna from 3-4 March 2014 on possible future work in public-private partnerships, but did not take any decision as to whether work on PPPs should be undertaken at the working group level. The Commission also reserved the possibility to consider the matter afresh if and when working group resources became available, and indicated that the Secretariat should continue limited preparatory work internally and using informal consultations, so as to ensure that a working group could take up the subject if a mandate were given.[9] Since that forty-seventh session, it has also been suggested that UNCITRAL may wish to collaborate with the World Bank to develop principles and procedures for sanctions systems for breaches of procedural and substantive rules such as those in the UNCITRAL Model Law on Public Procurement. Document A/CN.9/850 — A note by the Secretariat on possible future work in procurement and infrastructure development — provides the Commission with further information regarding these proposals, neither of which is envisaged to take place through a Working Group, but rather through informal working methods and colloquia.

(h) *Security Interests*: As Table 1 indicates, it is envisaged that a draft Model Law on Secured Transactions (the "draft Model Law") will be completed and submitted by Working Group VI to the Commission for consideration and adoption in 2016. At the present session, the Commission will have before it the reports of the Working Group (A/CN.9/830 and A/CN.9/836), in which recommendations regarding future work in this subject-area may be found.

In considering the draft Model Law, the Working Group has referred a number of matters to a guide to enactment of the draft Model Law for clarification. This guide to enactment can include references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") which refers to the various policy approaches that the legislator may follow with their comparative advantages and disadvantages and includes legislative recommendations as conclusions. However, the guide to enactment needs to explain in a short and focused way the draft model provisions that have a different formulation, different structure, and, subject to approval by the Commission, a different scope from that of the Secured Transactions Guide. Thus, the Working Group may request the Secretariat to prepare a Guide to Enactment of the draft Model Law at its twenty-seventh session.

As to the contractual guide on secured transactions in particular for small and medium-sized enterprises and enterprises in developing countries, and to a uniform law text on intellectual property licensing, topics that were placed by the Commission on its future work agenda at its forty-third session (see A/65/17, paras. 264 and 273), the Commission may wish to consider them at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting.

16. The Commission may wish to assess the need for conference time for those of the above proposals it decides to take up, and to make recommendations regarding the use of conference time and regarding informal working methods accordingly.

B. Current and possible future activities to support the adoption and use of UNCITRAL texts

17. The Commission has emphasized the importance of support activities and the need to encourage such activities at the global and regional levels through the Secretariat, through the expertise available in the Working Groups and Commission, through member States and through partnering arrangements with relevant international organizations, as well as promoting increased awareness of UNCITRAL's texts in these organizations and within the United Nations system (A/69/17, paras. 263-265). It has also reaffirmed the Secretariat's mandate to explore

[9] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 255-260.

alternative sources of financing to allow for more active support activities to be undertaken (A/69/17, para. 266).

18. Details of current support activities including reports on the activities referred to in the preceding paragraph are found in the series of documents before the Commission (the documents listed in para. 8 above).

19. In accordance with the deliberations of the Commission at its second, third, thirty-first, forty-first, forty-fourth and forty-fifth sessions where it promoted the dissemination of information and the harmonization of the application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention", A/CN.9/814, para. 1) as well as the preparation of a guide on that convention, the Secretariat's work on the finalization of a guide on the New York Convention, in close cooperation with experts, is ongoing. Some chapters of the guide are currently contained in documents A/CN.9/786, A/CN.9/814 and its addenda, as well as on the website www.newyorkconvention1958.org.

20. The Secretariat plans to prepare and distribute an accession toolkit in respect of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), as well as for the United Nations Convention on Transparency in treaty-based Investor-State Arbitration ("The Mauritius Convention on Transparency"). It is anticipated that this material will assist States intending to ratify the instruments; work in relation to the Rotterdam Rules has proceeded in preparing the materials and it is expected that the text will be finalized for the Commission to note at its 49th session in 2016.

IV. Allocation of resources

A. Future legislative development

21. At its forty-sixth session, the Commission underscored the importance of a strategic approach to resource allocation, in the light of the increasing number of topics referred to UNCITRAL for consideration (A/68/17, para. 294). The Commission therefore set out certain strategic considerations, including as regards prioritization among subject-areas and activities, and resource considerations (A/68/17, para. 295). The Commission has also emphasized the benefit of UNCITRAL's primary working method — that is, legislative development through formal negotiations in a working group (A/69/17, para. 249).

22. At its forty-seventh session, the Commission agreed that resource constraints required prioritization among legislative and support activities, and that flexibility and the greater use of informal working methods might be considered on a case-by-case basis (A/69/17, paras. 243 and 249). It also expressed the view that planning beyond the next Commission would remain an exceptional situation (A/69/17, para. 251).

23. The Commission also reaffirmed that it retained the authority and responsibility for setting UNCITRAL's workplan, especially as regards the mandates of Working Groups, though the role of Working Groups in identifying possible future work and the need for flexibility to allow a Working Group to decide on the type of legislative text to be produced were also recalled (ibid.).

24. Accordingly, the Commission may wish to consider the items set out in Table 2 above ("Summary of possible future legislative activity"), and to decide which of those possible projects should be undertaken in the year to 2016.

B. Future support activities

25. As regards support activities, the Commission has recalled the need to encourage such activities at the global and regional levels through both the Secretariat and member States (ibid., para 263), including through partnerships and alliances given UNCITRAL's resource constraints (ibid., paras 263-264).

26. At its forty-seventh session, the Commission encouraged the Secretariat's mandate to explore alternative sources of financing to allow for more active support activities to be undertaken (though cautioning that significant contributions might not be expected (ibid. para 265). In this regard, and in the light of the support activities set out in the relevant documents referred to in paragraph 4(a), the Commission may wish to consider possible future support activities and possible additional sources of financing for those activities.

C. Commemoration of fiftieth anniversary of the establishment of UNCITRAL in 2016

27. The Commission may be aware that the fiftieth anniversary of the establishment of UNCITRAL will take place in December 2016, and may wish to consider whether and how to mark that occasion.

28. Following the twenty-fifth anniversary of the establishment of UNCITRAL, and as part of the twenty-fifth session of the Commission, a Congress on International Trade Law was organized. It was held during the last week of that session, from 18 to 22 May 1992, in New York, in the context of the United Nations Decade of International Law (1990-1999).[10] The theme chosen for the Congress was "Uniform Commercial Law in the 21st Century", and it was designed as UNCITRAL's contribution to the Decade of International Law.

29. The participants were invited to consider the achievements attained in the "progressive unification and harmonization of international trade law" during the 25 years prior to the Congress, along with the needs that could be anticipated in the following 25 years. Over 60 speakers from different regions and legal systems provided information on developments in major areas of international commercial law. The Congress was practice-oriented "in that it would provide to practising lawyers, corporate counsel, ministry officials, judges, arbitrators, teachers of law and other users of uniform legal texts",[11] and focussed on the principal legal texts of universal relevance. It also considered the then current state of the unification of the laws and rules governing international commerce and practical needs as a basis for future work.[12]

30. At the twenty-fourth Commission session, i.e. the session prior to the Congress, the Commission welcomed a Secretariat proposal that the Commission might organize a Congress on International Trade Law to be held in the context of the twenty-fifth session of the Commission in 1992, agreed that one week of the twenty-fifth session should be devoted to the Congress, and considered that speakers at the Congress should be from "all the major legal systems and geographical regions of the world and should include both individuals currently or formerly associated with the Commission and individuals not associated with the Commission but who had particular expertise."[13] It emphasized that it would be desirable to attract the "interest of ultimate users of uniform legal texts, such as practising lawyers, corporate counsel, ministry officials, judges and teachers of law."[14]

31. Furthermore, it was noted that among the questions to be discussed at the Congress were: "the merits of various techniques for the unification and harmonization of rules on international trade; methods of work of the Commission

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[10] As declared by the General Assembly in its resolution 44/34 of 17 November 1989.

[11] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), paras. 190-192.

[12] UNCITRAL Yearbook, Volume XXIII: 1992, Chapter IX. United Nations Decade of International Law, UNCITRAL Congress under the theme "Uniform Commercial Law in the 21st Century", pp. 399-401. For the proceedings of the Congress, see Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992 (A/CN.9/SER.D/1).

[13] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17* (A/46/17), para. 346.

[14] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17* (A/46/17), para. 347.

and its subsidiary bodies; promotion of the adoption and use of existing legal texts; application of texts relating to international trade law in national legal systems; harmonization between the universal and the regional codification of international trade law; and methods of improved coordination of the activities of international organizations active in the field of unifications of law."[15] The Secretariat was accordingly entrusted with the organization of the Congress, also taking into account any suggestions and observations that Governments and international organizations might make.[16]

32. In the context of the fortieth anniversary of UNCITRAL, the Commission approved plans made at its thirty-eighth and thirty-ninth sessions in 2005 and 2006 respectively, for a congress similar to the 1992 Congress.[17] The 2007 Congress, entitled "Modern Law for Global Commerce", took place on the occasion of the fortieth session of the Commission, from 9-12 July, 2007, in Vienna. This Congress reviewed the results of the past work programme of UNCITRAL and of related work of other organizations active in the field of international trade law, assessed current work programmes, and considered and evaluated topics for future work programmes.[18] There were over 60 rapporteurs, who presented reports of the 14 working sessions. Among the topics considered were the "Process and value of uniform commercial law" (process and methods of international rule-making, allocation of work among formulating agencies, coordination of domestic positions in international forums); Harmonization of commercial law: practical importance and economic value; Commercial law development and technical legal assistance: goals and stakeholders; as well as a review of the then topics before UNCITRAL Working Groups and proposals for future legislative development.

33. The Commission may wish to consider whether a third UNCITRAL Congress might be held, perhaps on the occasion of its fiftieth session in 2017 (which will take place in Vienna). If so, it may wish to instruct the Secretariat on the possible scope and scale of the Congress, and associated matters. In this regard, the Commission may also wish to have regard to the issues discussed in a Briefing on "Means of implementation: harmonizing and modernizing the law of international trade", held in New York on 5 February 2015.[19]

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[15] Ibid., para. 348.

[16] Ibid., para. 349.

[17] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), para. 245.

[18] See, further, "Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission", New York, 2011, available at www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

[19] www.uncitral.org/pdf/english/whats_new/2015_02/5_February_2015_briefing_consolidated_statements.pdf.

B. Note by the Secretariat on planned and possible future work in procurement and infrastructure development

(A/CN.9/850)

[Original: English]

Contents

I. Introduction

1. This Note has been prepared to enable the Commission's consideration of possible future work in procurement and infrastructure development at this forty-eighth session. It addresses two possible areas of legislative development: suspension and debarment in public procurement, and public-private partnerships.

II. Proposed future work in Procurement and Infrastructure development

A. Suspension and debarment in public procurement

2. Article 9(2)(f) of the UNCITRAL Model Law on Public Procurement (2011)[1] permits the exclusion of suppliers from public procurement proceedings if (among other things) they have been "disqualified pursuant to administrative suspension or debarment proceedings". The accompanying Guide to Enactment[2] notes that such an exclusion from future procurement may be temporary or permanent,[3] and is imposed commonly as a consequence of misconduct, corrupt activities or unethical behaviour (such as issuing false or misleading accounting statements or attempting to distort the procurement process through inducements or collusion). The Guide adds that alleged wrongdoers should be accorded due process rights,[4] and that, in some systems, commercial wrongdoing (such as failure to enter into a procurement contract or to fulfil contractual obligations) can also lead to sanctions against the supplier concerned.[5]

3. The Model Law does not provide any procedural rules for supplier exclusion. The Guide to Enactment does not further address suspension and debarment. Nonetheless, it is emphasized in the Guide that a key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary: these mechanisms include reviewing

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[2] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

[3] Suspension refers to temporary measures, typically a year or less, whereas debarment refers to restrictions of up to three years or longer. Debarment has serious consequences, potentially taking a company out of the marketplace long enough to lose competitive standing in a field, but systems vary in their use of the terminology. See, also, Guide to Enactment, commentary on Administrative Support, para. 69.

[4] Guide to Enactment, commentary to article 9(2)(f).

[5] Guide to Enactment, commentary to article 17, para. 12.

and challenging procurement officials' decisions, audits and investigations, as well as sanctions and debarment procedures, which can arise under article 21 on the exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements, an unfair competitive advantage or conflicts of interest, or as breaches of the code of conduct required by article 26 of the Model Law, or as breaches of other obligations under the Model Law.[6] In addition, the Guide notes that the "enacting State should therefore have in place generally an effective system of sanctions against corruption by government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process, aimed at enhancing governance throughout the system".[7] It has been noted that "effective, proportionate and dissuasive" sanctions where a corruption offence is committed are also a baseline requirement of the United Nations Convention against Corruption.[8]

4. While there is general agreement that procedures for suspension and debarment are important elements to support the effective implementation of a procurement law and particularly to fight corruption,[9] there are considerable variations among suspension and debarment systems in practice. Indeed, it has been stated that in one country, "guidance on the subject is considerably fragmented across multiple orders and instructions by a number of oversight authorities [footnote omitted], with considerable scope for confusion amongst procurement officials and government contractors alike, potentially leading to inefficiency in application and achievement of desired outcome".[10]

5. This fragmentation is replicated among national and international systems more generally, as a review reported at a colloquium on the topic in 2012.[11] (The systems considered were those of the European Union, India, the United Kingdom of Great Britain and Northern Ireland, the United States of America (federal procurement system), and multilateral development banks). The differences range from the goals of suspension and debarment procedures, through the nature of the procedures to the available sanctions. At a recent meeting of the Organization for Economic Cooperation and Development (OECD) Meeting of the Working Party of the Leading Practitioners on Public Procurement,[12] when considering the implementation of the OECD's recently-adopted Recommendation on Public Procurement,[13] significant differences between systems in the European Union and Canada were also noted.

6. Regarding the objectives of the procedures, and while all systems are designed to deter wrongdoing as well as to impose consequences, there is generally one of two

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[6] See, also, Guide to Enactment, commentary in the Introduction to Chapter VIII (Challenge mechanisms).

[7] Guide to Enactment, commentary to article 21, para. 3.

[8] Article 30 of the Convention requires that each State party "make the commission of an offence established in accordance with [the] Convention liable to sanctions that take into account the gravity of that offence," and it is noted that suspension and debarment are among the appropriate sanctions. See, further, The United Nations Convention against Corruption, A Resource Guide on State Measures for Strengthening Corporate Integrity, United Nations Office on Drugs and Crime (UNODC), 2013, available at www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strengthening_Corporate_Integrity.pdf.

[9] See, for example, statement of World Bank President, Jim Yong Kim, in 2014: "Around the world, governments are creating and modernizing administrative bodies that can respond to claims of wrongdoing in public procurement or in the use of donor funds. They are a crucial component of the global movement to combat fraud and corruption," available at http://www.worldbank.org/en/news/press-release/2014/06/25/world-bank-publishes-data-lessons-learned-debarment-cases-2007.

[10] Verma, Sandeep, Sending Contractors on a Holiday: Proposed Rules for an Integrated and Seamless Approach in the Ministry of Defence to Debarment and Suspension of Erring Entities (May 23, 2014), at page 1. Available at SSRN: http://ssrn.com/abstract=2441040 or http://dx.doi.org/10.2139/ssrn.2441040.

[11] Colloquium on suspension and debarment: towards an integrative approach? http://globalforumljd.org/events/2012/100912_suspension.htm.

[12] 27-28 April 2015 at OECD Headquarters in Paris, France.

[13] Recommendation of the Council, 18 February 2015, C(2015)2.

discrete goals. On the one hand, the aim may be to protect the government customer from individuals and organizations with which it should not do business or to which it should not entrust public funds, whether the risk arises in terms of performance, reputation or both. On the other, the system may focus as a primary matter on the punishment of suppliers that do wrong.

7. Systems can also be what is termed "discretionary", or they may be "mandatory" or "punitive", largely reflecting these differences in goals. Mandatory systems require sanctions to be imposed on suppliers found guilty of wrongdoing, whereas discretionary systems do not require particular sanctions, but allow the sanctioning body to take account of the extent of performance risk and of possible or likely consequences for the procurement market if a supplier is excluded.

8. This issue takes on particular significance where the sanction involves exclusion for long period (one example was given of ten years or more), which is likely to drive a supplier with significant government business out of business. Where exclusion is not mandatory, alternative approaches such as self-cleaning (acceptance of culpability and setting up programmes to ensure appropriate standards in the future) can be found. Some systems feature mandatory exclusion for more egregious conduct, but allow discretion for lesser misconduct. Other consequences can include civil penalties and criminal convictions.

9. The evidential burden to establish wrongdoing extends from "adequate" evidence or a preponderance of the evidence, as assessed by the sanctioning body, to a requirement for a prior criminal conviction. The burden of proof to overturn decisions to suspend or debar through appeal may also be relatively low or extremely high.

10. This variety of practice has further consequences given an increasing emphasis on "cross-debarment". "Cross-debarment", refers to the ability to exclude a supplier suspended or debarred in one country or system from procurement in others. This question has involved considerable coordination efforts among the multilateral development banks, but more work is needed to allow national systems and those "international" systems to work effectively together. The colloquium referred to above noted that a rule under which a debarment in one country or system worked automatically to cross-debar the supplier concerned in all countries and systems would be too rigid and unworkable, but emphasised the need for a coherent approach. International infrastructure and development financing involves procurement using suppliers that may operate in many countries, and there is an increasing emphasis on cross-border procurement in policy and practice.

11. So far as due process is concerned, UNODC has noted that the severity of debarment, especially for individuals and smaller businesses, is such that "clear standards of conduct and procedural protections to prevent abuse are essential".[14] States have signalled their desire to implement appropriate rules in their national systems, so as to provide appropriate support to their procurement law and other rules, and to comply with their obligations under UNCAC.

12. Nonetheless, it is clear that there is no harmonised standard as a source material, and some States have signalled the need for a coherent transnational system. For example, the proposed new framework for the World Bank's procurement system will consider permitting Bank-funded procurement to use the country's own procurement system (as opposed to a requirement to follow the Bank's own procurement system) where, among other things, the borrower country applies (as appropriate) the Bank's debarment list.[15] In addition to supporting the consistent implementation of

[14] A Resource Guide on State Measures for Strengthening Corporate Integrity, note 8 supra, at page 23.

[15] See "Procurement in World Bank Investment Project Finance Phase II: Developing the Proposed New Procurement Framework", para. 44, available at https://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/materials/procurement_in_world_bank_investment_project_finance_-_phase_ii_0.pdf.

UNCAC's requirements,[16] convergence of systems is necessary to avoid fragmented systems in which different standards of conduct and sanction apply within one system (where some procurement is externally-financed) and among systems that need to work together. Consequently, it is submitted that a legislative text to facilitate appropriate procedures and safeguards for suspension and debarment procedures would assist significantly in this regard: similar options as would be needed were set out in Chapter VIII of the Model Law on Public Procurement, and the provisions concerned are being found useful in practice.

13. The Commission's statements of when a legislative mandate might appropriately be given have been considered on this topic. The first question is whether suspension and debarment procedures are likely to be amenable to harmonization and the consensual development of a legislative text. It is submitted that the variations in existing systems, on the information available, are more closely connected with whether the system is primarily punitive or discretionary, and on the associated consequences – that is, variations arise in the implementation and use of procedural rules. The core principles for the rules — that they should reflect UNCAC commitments, including on sanctions for procurement abuse that are "effective, proportionate and dissuasive," — do not appear to be disputed.

14. The Commission may therefore consider that there may be consensual legislative development, but that the scope of any future text and the policy issues for deliberation may need further elaboration. Given the importance of cross-debarment in public procurement, the Commission may also take the view that a legislative text on the topic would enhance the law of international trade so far as public procurement is concerned.[17]

15. However, the Commission has also emphasized that legislative development should not be undertaken if so doing would duplicate work on topics being undertaken by other law reform bodies, and preparatory work to identify any areas of potential duplication should be undertaken before a topic is referred to a working group.[18] In this regard, initial consultations indicate that development of an UNCITRAL standard would not duplicate existing activities in other relevant reform bodies but would in fact complement them.

16. It is therefore recommended that the Commission authorise the Secretariat to explore the possible development of a legislative text in this area. Part of the preparatory work would involve further consultations with appropriate stakeholders — notably including the World Bank and other multilateral development banks, the UNODC and States — to test the assumptions and conclusions set out above, and to avoid duplication of efforts. The institutions referred to have indicated that they would both welcome and participate in a project to develop international norms and standards in this field, notably in the form of a legislative text that can be flexibly implemented.

B. Public-private partnerships (PPPs)

(a) Background and activity since Commission session in 2014

17. At its forty-seventh session, the Commission considered a report of a Colloquium held in March 2014, which had concluded that the UNCITRAL texts on Privately-financed Infrastructure Projects were highly-regarded, but that they were

[16] The Implementation Review Group (a Working Group of the UNCAC Conference of States Parties) is considering, among other things, proposals "to identify challenges and good practices and to consider technical assistance requirements in order to ensure effective implementation of the Convention", which the Group will address at its sixth meeting, to be held in Vienna (25-26 June 2015). See, further, http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/1-5June2015/V1501966e.pdf.

[17] A/68/17, paras. 303-304.

[18] Ibid.

considered under-utilised and in need of updating. The Colloquium consequently recommended that the Commission provide a mandate for the development of a Model Law and accompanying Guide to Enactment on PPPs (and set out the scope of the work envisaged).[19] At that session, the views of member States on the recommendations were divided: some expressed support for them, and others did not.

18. While recognising that PPPs were a topic of importance to member States (and particularly to developing countries) and the donor community,[20] after discussion, the Commission declined to provide the mandate sought, but reserved the possibility to consider the matter afresh if and when Working Group resources became available. Two key factors that the Commission took into account were that (a) while the scope of a project to develop a legislative text on PPPs had been delineated at the 2014 Colloquium, legislative development on PPPs would involve a significant and lengthy project, and (b) the existing UNCITRAL texts on Privately-Financed Infrastructure Projects could be used to harmonize and modernize laws in this field at the national level. In this regard, the Commission did not accept the conclusions of the Colloquium, which had also recommended that a Model Law on PPPs be developed.[21]

19. The Commission also authorised the Secretariat to engage in limited preparatory work (a) to advance preparations for legislative development in PPPs, internally and using informal consultations, so as to ensure that a Working Group could take up the subject if a mandate were given, and (b) to assist the Commission with a further review of whether or not to take up legislative development in this subject-area, which the Commission would discuss further at this forty-eighth session.[22]

20. Accordingly, the Secretariat has engaged in limited virtual- and telephone-based consultations with experts and representatives of States and donor/reform organizations — primarily, the World Bank and regional development banks, the United Nations Economic Commission for Europe and the OECD. This section of this Note sets out the conclusions of these consultations on the above two matters, which are presented together to reflect that they are closely-linked.

21. The Secretariat therefore asked the experts and other participants (a) to provide information from their countries or regions of activity that would be of assistance in reforming the PFIPs texts, and (b) to review the provisions of the PFIPs texts in the light of the comments at the Commission session in 2014.

22. The participants provided significant information about PPP systems in various regions — in particular, in Africa, geographical Europe and north and south America. The information indicates emerging convergence in policy issues, but some differences in some regions, notably as regards the extent to which PPPs primarily take the form of concessions (rather than what are sometimes termed public-payment PPPs). Concession-type PPPs are primarily remunerated through third party charges, whereas in public-payment PPPs, the remuneration is more certain and derived largely from the public sector, so that the commercial risk profile varies between these two types of PPP. Nonetheless, it was agreed that there are many similarities in the planning, preparation and procurement of both types of PPP, but that the institutional, contractual and legal regimes exhibit some differences in practice. Consequently, it was considered practicable to identify the core elements common to both types of PPP, so that a revised legislative text could address elements relevant for all types of PPP.

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[19] A/CN.9/821, paras. 120-121.

[20] The Commission heard that the Colloquium had "reaffirmed the potential of PPPs to make enormous contributions to sustainable economic and social development, and in particular to fill a significant infrastructure funding gap identified by many empirical studies and commentators. It considered that the resultant need was most acute in developing countries, and that PPPs with small private operators (such as MSMEs) could also support local and regional development. Experience with substandard and failing PPPs, it was recognized, underscored the need for an effective legislative model for States to use to develop best practices and standards so as to allow efficient and effective PPPs." A/CN.9/807, para. 13(g).

[21] A/69/17, para. 255 (c).

[22] Ibid., para. 260.

23. The additional requirements for concession-based PPPs (which differ more from modern systems for the public procurement of large infrastructure projects, and public-payment PPPs) could thereby also be given appropriate focus. It was agreed that this approach would reflect the approach of the existing PFIPs texts, and implement the notion of "core PPPs" discussed at the 2014 Colloquium.[23] However, experts also advise that there has been an increase in public-payment PPPs (which were less common than concession PPPs in the period during which the PFIPs texts were developed), and a new text would reflect that the budgetary implications of these PPPs require additional commentary on project selection and value for money comparators.

24. In addition, there was a clear understanding that some parts of the existing PFIPs texts needed simplification, and that some existing guidance could now be reflected in legislative language, to reflect market developments. While institutional PPPs could (and, in the view of the experts, should) be included, other novel approaches — such as project alliancing — would be more difficult to address appropriately, and it is recommended that they not be included.

25. The participants also reviewed the entire PFIPs texts to identify text that needed to be consolidated, amended, re-drafted and/or deleted, and where additional text or provision would be required. The conclusions of the 2013 and 2014 Colloquiums were also taken into account in this exercise. Available from the Secretariat is a tabular presentation of the conclusions as regards each subsection of the Legislative Guide, and each Legislative Recommendation and Model Legislative Provision.[24] A brief summary of the conclusions follows:

26. As regards "Introduction and background information on PFIP": amend the drafting to reflect modern approaches to the concepts of fundamental public interest, value for money comparators, sustainability and other terminological issues and definitions, and distinguish PPPs in which the project partner is responsible for delivering full or limited public services, so as to reflect the scope of core PPPs and modern practice.

27. As regards "Background information on PFIP": simplify the text and eliminate unnecessary discussion, and explain the differences between the two main types of PPP (as noted above), update to provide appropriate recent experiences, and include appropriate cross-references to the UNCITRAL Model Law on Public Procurement.

28. As regards "Other relevant areas of law": minor simplification only.

29. As regards "General legislative and institutional framework", revisions to balance more effectively the public and private interests; to support capacity on the part of the public authorities; to address preparatory measures and project selection; to broaden the scope of necessary institutional mechanisms and governance aspects of the relevant institutions (including, for example, competition authorities as well as PPP Units and Committees, which are very commonly found in States using PPPs, and as the Colloquium noted, require additional provision in any new legislative text).[25]

30. As regards "Project risks and government support": a more articulate discussion of three economic aspects of projects to be set out, and discussions of particular risks and risk-sharing; expand on the links between risk allocation, provision of guarantees, value for money and overall economic advantages of the project, and recommend on transparency from the public side.

31. As regards "Construction and operation: legislative framework and project agreement": address contractual forms, limitations on freedom of contract and minimal contractual requirements (with a possible broader scope of the project

[23] A/CN.9/821, para. 27.

[24] Copies of the tabular presentations, which run to some 50 pages, are available currently in English only. The tables will be translated at a future time, following the decision of the Commission.

[25] A/CN.9/821, paras. 35-40.

agreement); a more in-depth discussion of subcontracting arrangements and liabilities, and of re-negotiation, re-financing and modification of contracts during the term of the project (including regarding contract specifications); clarify that the project agreement may extend to a group of documents.[26] Additionally, more clarity on the scope of the concessionaire's activity, on the different concepts of ownership (and acquiring ownership) of the project site, on tariffs and fees, and guarantees to complement them and mitigate political risks (some of which may be negotiable, and others treated as minimum legal guarantees). As regards operation of the infrastructure, more guidance is required on standards and obligations of the project party, execution of the public authority's instructions, and appropriate time limits for concessions. Greater transparency in terms of making the main terms of the project documents publicly available is recommended.

32. As regards "Duration, extension and termination of the project agreement": address time limits for projects; investment issues and the materialisation of risks; revise to ensure better linkage between modifications and termination.

33. As regards "Settlement of Disputes": make the guidance more practical; introduce more articulate recommendations on the use of arbitration and when submission to dispute boards may be a mandatory initial step; introduce emergency arbitration; expand guidance on national as compared with international forums for dispute resolution, and on ensuring independence of the forum, on choice of law, and on disputes between shareholders, lending parties, operational consortium partners, regulators and operators and contractors and subcontractors, as well as between the public authority and the project partner.

34. The tabular presentation identifies both where new legislative recommendations or provisions can be made, and where the existing guidance should be updated or revised, and it can be seen that while experience in PPPs in practice varies, there is a coherent set of suggestions that can be aggregated into a revised Legislative Guide with legislative recommendations and model provisions, with all three elements consolidated and presented together.[27]

35. The experts, after conducting this exercise, consider that the extent of work required to achieve this goal is not extensive, and with limited Secretariat oversight, could be undertaken in approximately one year. A project to develop a full Model Law was considered to involve considerably more resources and, given the uncertainty expressed at the Colloquium as to whether it would be feasible,[28] the experts and participants consider that including model legislative provisions or legislative recommendations in the body of a revised Legislative Guide would provide an appropriate balance at this stage between a user-friendly text, on the one hand, and acknowledged resource constraints on the other. In addition, the experts and participants recognise that the need for this type of revised UNCITRAL text in the short-term is greater than for a Model Law and Guide to Enactment in a longer time frame.

(b) Recommendations

36. During the consultations, several member States (both developed and developing countries), members of the donor community, and some regional organisations advised that they would welcome and use a modern legislative text on PPPs. The Secretariat has received a formal statement of support from one developing country for legislative development in PPPs. However, there remains a reluctance from some States to commit resources to the development of such a text in a Working Group. Various reasons have been given, the most significant of which are: public-sector budgetary constraints, a lack of experience in the field that would enable meaningful participation, and pressure on available human resources within States to

[26] The views differed on whether some of the existing text was unnecessary and could be deleted.

[27] There is no separate consideration of the procurement aspects of PPPs, as there is consensus that this aspect will be conformed to the relevant provisions of the UNCITRAL Model Law on Procurement, as agreed at the 2014 Colloquium, see A/CN.9/821, paras. 90-95.

[28] A/CN.9/821, para. 122.

focus on national PPPs projects rather than on the development of international norms and standards. On the other hand, experts working in the field and donor organisations are willing to volunteer their services to support work on PPPs in UNCITRAL, and to develop a revised Legislative Guide as discussed above.

37. On the basis that legislative development to produce a modern legislative text on PPPs would be feasible, the Secretariat has analysed recent guidance from the Commission regarding whether a project to such end would be beneficial and, if so, the form that such a project might take.

38. The Commission has regularly emphasised the importance of legislative development through formal negotiations in a working group, as the transparency, multilingualism and inclusiveness that the formal negotiation process involves supports the universal applicability and acceptance of those texts.[29] The Commission has also concluded that a balance of the formal approach and legislative development through Secretariat studies, assistance of outside experts and colloquia ("informal working methods") should be assessed in the light of the nature of the topic concerned.[30]

39. In the light of the conclusions on the nature and extent of the work identified in subsection (a) above, and the likely commitment of member States to any project to develop a legislative text on PPPs, the Commission may wish to consider how any mandate to revise the PFIPs texts might be undertaken. For example, a mechanism that would allow issues to be widely discussed during the development process may be appropriate, to encourage broad participation and the support of regional organizations including the multilateral development banks where possible. The goal of such a mechanism would be to ensure the inclusion of experience from all regions and reduce the impact of some of the other concerns about informal working methods that have previously been expressed by the Commission.

40. One way of achieving an appropriate balance could be through the submission of draft revisions to the existing Legislative Guide to one or more colloquia, as the Commission has previously contemplated (A/CN.9/807, paras. 48-49). In this regard, the Commission may recall that UNCITRAL can organise colloquia using conference time (which includes translation resources), to the extent that conference time is available within UNCITRAL's allocation. In addition, it would be anticipated that any draft text would be submitted to the Commission for its consideration and possible adoption.

[29] A/68/17, para. 300, noting the issues set out in A/CN.9/774, paras. 15-17.

[30] The Commission has also expressed concerns about some aspects of informal working methods, including that there may be less than full transparency, decreased multilingualism and inclusiveness, and possible dominance by specialized groups and interests (A/68/17, para. 301). See, also, A/72/16, para. 43, as reported in A/CN.9/774, para. 36; see also A/CN.9/752, paras. 35 and 37-40), and A/CN.9/807, paras. 19 and 33.

C. Note by the Secretariat on Possible future work in the area of electronic commerce - legal issues related to identity management and trust services - Proposal by Austria, Belgium, France, Italy and Poland

(A/CN.9/854)

[Original: English]

The Secretariat received the proposal by Austria, Belgium, France, Italy and Poland (in English and French). The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

The Secretariat received a proposal with the identical content (in English) from the Business Law Section of the American Bar Association (ABA) with the indication that it was "prepared by the Identity Management Legal Task Force of the ABA Section of Business Law and then adopted by the Section on April 18, 2015. The views expressed in this paper have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as necessarily representing the policy of the ABA." Annex

I. Introduction

1. Pursuant to the mandate given during the 44th session of the Commission in 2011, Working Group IV on electronic commerce (hereinafter Working Group IV) is carrying out its work on electronic transferable records.[1] During the 48th session of the Commission, the Working Group reported on the work carried out during its 50th and 51st sessions. Work on the model legal provisions for electronic transferable records is progressing significantly.

2. At its 44th session in 2011, the Commission also noted that support was expressed for dealing with the legal issues relating to identity management as a possible topic in the mandate of Working Group IV.[2] In this regard, it was indicated that it would be beneficial to monitor the situation with a view to better define the terms of a possible future mandate of the Working Group. [3] Moreover, the Commission also agreed that the extension of the mandate of Working Group IV to other topics, including that of identity management, would be considered at a future session[4] (as discrete subjects, rather than only with regard to the impact they can have on electronic transferable records).

3. Since the Commission's 44th session, the topic of identity management has taken on great significance for electronic commerce, and is now recognized as a foundational issue for most significant e-commerce transactions. Likewise, interest in using trust services to accomplish e-commerce transactions has also greatly expanded.

4. In this context, the aim of this proposal is to provide the Commission with the necessary information regarding both identity management and trust services with a view to considering a possible mandate to Working Group IV to address these topics.

II. Impact on UNCITRAL work products and texts

5. The work proposed in the areas of identity management and trust services is in line with, and a logical extension of (1) the work carried out by Working Group IV in the past (including the Model Law on Electronic Commerce, the Model Law on

[1] Report of the United Nations Commission on International Trade Law on the work of its 44th session (27 June to 8 July 2011), United Nations document A/66/17, para. 238.
[2] Ibidem, par. 236.
[3] Ibidem, par. 236.
[4] Ibidem, par. 239.

Electronic Signatures and the Convention on the Use of Electronic Communications in International Contracts), (2) the work currently in process (work on electronic transferable records), and (3) possible future work on other topics that have been discussed, such a single windows, cloud computing, and mobile payments.

6. At its essence, identity management is a set of processes to manage the identification, authentication, and authorization of individuals, legal entities, devices, or other subjects in an online context. It is designed to provide the answer to two simple questions that each party to an online transaction asks about the other party: "Who are you?" and "How can you prove it?" With a trustworthy verification of identity, a party to an online transaction can decide, for example, whether to enter into a contract with the other party, whether to allow the other party to access a sensitive database, or whether to extend some other privilege or access right to the other party. A basic overview of identity management — summarizing what it is, how it works, and the legal issues it raises — can be found in A/CN.9/WG.IV/WP.120, Overview of Identity Management.

7. In fact, identity management is a fundamental requirement that underlies most work products developed (or currently being developed) by Working Group IV. For example:

(a) Establishing the identity of the signer is one of the requirements for creating a valid electronic signature. Both Article 7 of the UNCITRAL Model Law on Electronic Commerce (1996) and Article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) require, as a condition of creating a valid electronic signature, that a "method is used to identify" the signer that is as reliable as was appropriate for the purpose for which the data message is generated or communicated. Article 2 of the UNCITRAL Model Law on Electronic Signatures (2001) also requires data "which may be used to identify the signatory" as a component of an electronic signature;

(b) Establishing identity is also a critical requirement for electronic transferable records, Single Window transactions, and mobile payments. In particular, several articles in the current draft provisions on electronic transferable records require establishing the identity of the signer of the transferable record and/or the holder entitled to enforce it.[5] Likewise, any future work on Single Window processes will require establishing the identity of the signer of customs documents, as well as the identity of the person or entity filing them and the person or entity entitled to enforce them.[6] Also, any future work on mobile payments will require (for purposes of authorization) the identity of the person purporting to transfer funds.[7]

8. In addition, many of the requirements for e-commerce transactions contemplated by the foregoing UNCITRAL texts may, at a party's option, be facilitated by the use of one or more trust services provided by third parties. A "trust service" can include a service for creating an electronic signature, applying an electronic seal to ensure the origin and integrity of a document, electronic time stamping a document to establish that certain data existed as of a certain date and time, and providing the secure transmission of a document between parties.

III. The importance of identity management and trust services for e-commerce

9. Reliable identity management has become a critical requirement for electronic business activities, especially as the significance and sensitivity of those transactions increases. In fact, an OECD study and guidance document on identity management

[5] See A/CN.9/WG.IV/WP.132 and WP.132/Add.1, Draft provisions on electronic transferable records, at articles 9, 10, 17, 27, and 28.

[6] See A/CN.9/728/Add.1, paras. 42 and 45.

[7] See A/CN.9/728, para. 52.

noted that "digital identity management is fundamental to the further development of the Internet economy."[8]

10. As a consequence, many entities, in both the public and private sectors, are now developing (or would like to develop) business models that provide, or rely on, identity management. The same is also true of trust services, some of which require identity management.

11. In many electronic transactions conducted via a website, for example, there is a need to verify the identity of a website owner to ensure that the website belongs to and is managed by the entity that purports to operate it. Likewise, in many cases it is important that the parties sufficiently identify themselves to each other when starting negotiations. Using an electronic signature to evidence a final agreement may also require separately identifying the signer, as well as time stamping the document to certify the date and time it was signed. Finally, in some cases it is important that documents are transmitted to the counterparty via a secure channel that ensures the date of dispatch and receipt of the document. Authentication of identity, and trust services, contribute significantly to a paperless trading environment, thus saving significant resources for businesses and public administrations.

12. Notwithstanding the benefits of identity management and trust services, market players are sometimes reluctant and cautious when it comes to the deployment or use of such services. While some of the reasons for this reluctance may relate to the costs as well as business and technical challenges, the legal challenges and uncertainties can also make it very difficult to build, implement, and use such systems. Because identity management and trust services are relatively new concepts, legal challenges include the fact that: (i) many businesses and States simply may not understand the legal issues involved, and (ii) in many cases, existing law is not set up to accommodate identity transactions, and may in fact create barriers to the full-scale deployment of identity management capabilities and trust services. Moreover, newly adopted laws in some jurisdictions conflict with similar laws in other jurisdictions, potentially leading to cross-border interoperability issues.

IV. Why the proposed work would be useful

13. Given the growing importance of verifying the identity of the other party in electronic commercial transactions of all types, and the increasing use of trust services by parties in certain types of electronic transactions, it seems appropriate to start working on related legal issues within UNCITRAL. Moreover, the analysis of these legal issues would help bring about the development of applicable uniform international legal frameworks, and would be useful for stakeholders when assessing the most suitable model for their activities.

14. Several national and regional initiatives in the field of identity management and/or trust services are actively underway. While they sometimes adopt conflicting approaches, they help to identify the relevant issues, and can be used to inform the discussion regarding the design of appropriate legal frameworks at an international level that could be transposed in existing legal systems. Examples of these initiatives include:

(a) National and regional legislation governing identity management and/or trust services that has recently been adopted or proposed, including the adoption on 23 July 2014 of the European Regulation on electronic identification and trust services,[9] the Belgian law on the eID card and the draft Belgian law on trust services,[10]

[8] OECD (2011) "Digital Identity Management for Natural Persons: Enabling Innovation and Trust in the Internet Economy — Guidance for Government Policy Makers", OECD Digital Economy Papers, No. 196, OECD Publishing, at p. 3.

[9] http://ec.europa.eu/digital-agenda/en/trust-services-and-eid.

[10] www.lachambre.be/FLWB/PDF/53/2745/53K2745006.pdf.

the French legislation on electronic signatures[11] as well as on electronic registered mail,[12] the Italian regulations on the posta elettronica Certificata,[13] and the Virginia [United States of America] Electronic Identity Management Act, effective July 1, 2015;[14]

(b) Public sector national and international initiatives, including the United States National Strategy for Trusted Identities in Cyberspace (NSTIC)[15] and its Identity Ecosystem Steering Group,[16] two OECD studies on Digital Identity Management,[17] the European Union STORK projects,[18] and the work of several groups including the ITU, the Digital ID and Authentication Council of Canada (DIACC),[19] and the United Kingdom of Great Britain and Northern Ireland Government Digital Service;[20] and

(c) Private sector national and international initiatives, including the ABA Business Law Section's Identity Management Legal Task Force,[21] the Kantara Initiative,[22] the Fast Identity Online (FIDO) Alliance,[23] the Secure Identity Alliance,[24] the Open Identity Exchange,[25] the Transglobal Secure Collaboration Program (TSCP),[26] and the Open Group: Identity Management Forum.[27]

15. The proposed work can help to coordinate the legal aspects of the work of many of the various national and international groups currently addressing these issues separately, and help to educate States and businesses unfamiliar with the legal issues involved, all with a goal of continuing to build trust in electronic commerce and electronic transactions.

16. In addition, the proposed work could supplement and provide pragmatic solutions to the documents already prepared by UNCITRAL. Specifically, it could help develop legal frameworks that would convert undefined or "abstract" requirements laid down by the above UNCITRAL texts into "practical and operational" actions. This would provide companies with well-defined legal frameworks to better manage their risks related to international e-commerce and to ensure the legal certainty of their electronic transactions in a clear and efficient way.

V. Goal and issues

17. The goal of the proposed work would be first to provide a basic legal framework covering identity management transactions, including appropriate provisions designed to facilitate international cross-border interoperability. Thereafter, the goal

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[11] www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000399095&dateTexte=&categorieLien=id.
[12] http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023513151.
[13] http://qualitapa.gov.it/relazioni-con-i-cittadini/open-government/strumenti-della-pa-digitale/la-posta-elettronica-certificata/.
[14] https://leg1.state.va.us/cgi-bin/legp504.exe?151+ful+CHAP0483.
[15] www.nist.gov/nstic/.
[16] www.idecosystem.org/.
[17] OECD (2011) "Digital Identity Management for Natural Persons: Enabling Innovation and Trust in the Internet Economy — Guidance for Government Policy Makers," OECD Digital Economy Papers, No. 196, OECD Publishing, at p. 3; and OECD (2011), "National Strategies and Policies for Digital Identity Management in OECD Countries", OECD Digital Economy Papers, No. 177, OECD Publishing.
[18] https://www.eid-stork.eu.
[19] www.diacc.ca.
[20] http://digital.cabinetoffice.gov.uk/category/id-assurance/.
[21] http://apps.americanbar.org/dch/committee.cfm?com=CL320041.
[22] http://kantarainitiative.org/.
[23] https://fidoalliance.org.
[24] https://www.secureidentityalliance.org/.
[25] http://openidentityexchange.org/.
[26] www.tscp.org.
[27] www.opengroup.org/.

would similarly be to provide a basic legal framework for each applicable trust service.

18. In all cases, developing a legal framework should be premised on two basic principles: first, the use of such systems or services should be voluntary and fully respect the autonomy of the parties to a transaction; second is the principle of neutrality — both technological and business model neutrality. Legislation should never limit innovation and business opportunities by introducing rules that purposely favour one specific technical or business solution over another.

19. The issues that might be addressed in developing such legal frameworks, whether for identity management or trust services, could include the following:

(a) Legal barriers: like prior Working Group IV projects dealing with e-commerce, identifying and removing inappropriate legal barriers is likely to be a key element of the proposed work. Such barriers can relate to many issues, including identification, signature, integrity, date, evidence of sending and receiving a document, trustworthiness, etc. In addition, a lack of international harmonization of these issues may itself create a significant barrier for the use of electronic identification and trust services;

(b) Trustworthiness: the trustworthiness of any identity management or trust services transaction is often a critical concern to the parties. Defining or measuring trustworthiness may be important in some cases and impossible in others. While many of the factors that affect trustworthiness are not legal in nature, there may be legal approaches that can be used to address concerns regarding trustworthiness. Such methods may include, for example, disclosure requirements that allow parties to accurately assess the situation, giving varying legal effects to certain types of conduct that might enhance or detract from trust, harmonizing certain requirements across jurisdictions, or imposing requirements governing conduct in order to ensure trust;

(c) Data security: the level of security provided by a party to an identity management transaction or by a trust service provider may affect the result, from a legal perspective. Currently, there are no international standards or regulations that set any legally mandated security obligations for identity management systems or for trust service providers. The absence of objective elements to assess the quality and trustworthiness of the service received may present a significant issue for the participants. Alternatively, a flexible model allowing varying requirements with respect to identity management or trust service providers could also be an option. Whether and how to establish appropriate requirements for security by identity management and trust service providers may be a key issue;

(d) Liability allocation: what is the liability regime for identity management systems and for trust service providers? When cross-border liability issues arise, the parties could be confronted with uncertain legal rules or case law. It may therefore be appropriate to consider whether developing clear rules on liability is possible or desirable, and if so how these rules should be structured;

(e) Legal effect: the legal effect of electronic identification and authentication, and the legal effect of many trust services, are often undefined. Except for electronic signatures, neither electronic identification nor any of the other trust services is defined or is currently given a cross-border legal effect by international law. This raises numerous questions, such as: Are they recognized by the other jurisdiction? Do they benefit from the principle of non-discrimination with regard to their paper equivalent? Do they benefit from other legal effects? Will a contract be considered as valid in the other jurisdiction? What are the remedies if a party fails to meet its obligations? The proposed work might also consider providing for specific legal effects for electronic identification and trust services to enable parties to manage their risks effectively.

20. The above highlights the importance of identity management and trust services for the development of international trade law as well as the need to provide market players with tools to ensure legal certainty of their electronic transactions.

VI. Work to be carried out by UNCITRAL

21. In the light of the above, we propose that the Commission undertake work in the field of identity management and trust services, and give priority to these topics. Taking account of the limited time and resources available, we propose to start by undertaking work in the field of identity management while progressively introducing the work related to trust services.

22. Taking account of the limited budgetary resources of the Secretariat, we propose to set up an informal group of experts to support the Secretariat in preparing legislative proposals in order to start discussions in the Working Group. This panel would be open to all delegations. If there is a need to collect additional information, the expert group could support the Secretariat in the possible organization of a symposium on the topic.

D. Note by the Secretariat on possible future work in the area of international arbitration between States and investors - code of ethics for arbitrators - Proposal by the Government of Algeria

(A/CN.9/855)

[Original: French]

1. In preparation for the forty-eighth session of the Commission, the Government of Algeria submitted to the Secretariat a proposal in support of future work in the area of international arbitration between States and investors. The proposal was submitted to the Secretariat on 25 May 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

At the sixty-second session of Working Group II (Arbitration and Conciliation) of the United Nations Commission on International Trade Law, Algeria, through its representatives, issued to the Secretariat the proposal to discuss the establishment of a code of conduct or ethics for arbitrators in the area of arbitration between States and investors.

This proposal is a natural outcome of the continuing recognition that, over the years, international arbitration has become a real public service, especially when it is conducted under the auspices of reputable institutions and independent, experienced lawyers.

This public service is of course a paid service, as the parties must not only remunerate their counsel, but also cover the costs of arbitration, and, insofar as it is essential to the proper exercise of global trade and where there are no other options for continuing to develop investment in all areas, arbitration should be encouraged regardless of the applicable regulations, provided that it meets mandatory quality requirements.

In reality, the entire practice is founded on the will of the parties expressed, of course, in the form of a contract.

As international commercial arbitration is an expression of the principles of a free world and also represents freedom of choice as regards dispute settlement method, it should not be set up against State justice but simply be understood as a form of legal settlement of disputes that respects the freedom of societies and individuals, allowing them, inter alia, to choose a judge, a key element of the trust that will subsequently determine whether the award will be accepted and enforced.

There is no international monopoly on arbitration in a world where the economy must move forward and where innovation is at the fore; competition between different forms of arbitration is a way to improve quality, to eliminate bureaucracy, and to increase the efficiency and effectiveness of arbitration procedures.

It is well known that money and morality do not often mix well; arbitration is often associated with business, interests, confidentiality and networks and implies flexibility, pragmatism, realism and compromise, whereas ethics require a certain impartiality, transparency, detachment from material contingencies, a degree of intransigence and an ability to clearly and simply discern the acceptable from the unacceptable.

The topic to be addressed here relates more fundamentally to the procedural conduct of arbitration actors, their mutual relationships, and the values that they are expected to share and even convey in accordance with what might be called a philosophy of arbitration, an alternative justice to State justice and litigation, where hearings should be conducted under ideal conditions of mutual respect and general harmony despite the cultural differences and heated atmosphere which are inherent to any dispute.

Regarding arbitration, one might say that arbitration ethics must bring together a set of values and behaviours that the various actors involved in proceedings should respect or ensure respect for in order to safeguard the arbitration of their disputes, that is, an integrated and sustainable alternative justice mechanism in which those who have recourse to it may place their trust.

It is not simply a matter therefore of establishing which lines should not be crossed, or even less so of compiling an exhaustive list of behaviours that might be considered immoral, deviant or unfair.

Ethics are thus necessary not simply in order to better conduct arbitration proceedings, but because they appear essential to arbitration proceedings and the success thereof.

Ethical guidelines would be independent and would impose no sanctions but act as the voice of conscience; arbitration law has gone beyond mere sanctions — if indeed there are sanctions — and now needs ethics in order to find its bearings again and a new lease of life.

The arbitrator should leave no stone unturned and should strictly refrain from speaking unilaterally to one party's counsel, even in contexts unrelated to the arbitration proceeding.

It is of prime importance to know when conduct may be considered not the result of a pre-existing legal obligation but as the manifestation of a moral duty incumbent upon us without it being set in stone.

While the arbitrator's task is to make a decision, the way in which the decision is rendered, which should be beyond reproach, is also subject to scrutiny, not only by the parties.

Upon careful consideration, the ethical duty of arbitrators seems an inherent component of their legal, and even contractual, mission. Do we not also impose a duty of good faith on co-contractors in the performance of their contracts? Even though, as judges, they do not in principle make decisions according to equitable principles but with reference to the law, arbitrators are duty-bound to render fair decisions independently and impartially after due process has been carried out in accordance not only with the principles of participation and equality of the parties, but also with the mission entrusted to them. The arbitrator is, as we know, both a legal and a contractual person, which leads him or her to be constantly faced with issues of conscience and inevitable tension between, on the one hand, the need as a judge to remain above partisan discussions and the contingencies of the dispute and, on the other hand, the desire to please and give satisfaction as a contractor, that is, as a service provider who hopes that his or her contract will be renewed and that his or her fees will be paid.

Although they are not legal regulations strictly speaking and therefore devoid of any sanctions, the fact remains that a breach by an arbitrator of one of his or her duties may have legal consequences. While the setting aside of an award does not currently appear to be the most natural sanction, there are a range of solutions that would neither ignore nor leave without consequence the arbitrator's non-compliance with the ethical framework of arbitration. These include removal of an arbitrator from proceedings, reduction or non-payment of fees, civil or criminal liability, and the ultimate and effective sanction of non-appointment to further arbitration cases. An unethical arbitrator destroys his or her reputation which itself represents the basis of his or her business.

In conclusion, we propose that a code of ethics for arbitrators in the area of arbitration between investors and States be established in keeping with the spirit and articles of the UNCITRAL Arbitration Rules.

E. Note by the Secretariat on possible future work in the area of electronic commerce - Contractual issues in the provision of cloud computing services - Proposal by Canada

(A/CN.9/856)

[Original: English, French and Spanish]

The Secretariat received the proposal by Canada (in English, French and Spanish). The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

CONTRACTUAL ISSUES IN THE PROVISION OF CLOUD COMPUTING SERVICES GOVERNMENT OF CANADA

I. Foreword

1. At its forty-seventh session, in 2014, the Commission received two progress reports from Working Group IV on Electronic Commerce about its work on model provisions for electronic transferable records. Given the progress accomplished on the model provisions, the Commission was asked to consider future work in the field of electronic commerce which would be undertaken after the forty-eighth session of the Commission, when the current mandate of Working Group IV is completed.

2. In that context, the Commission took note of a proposal by the Government of Canada with regards to legal issues on cloud computing (A/CN.9/823). It was explained that the proposal was intended to request the Secretariat to gather information relating to cloud computing and to prepare a document identifying potential risks stemming from current practices in relation to conflict of laws, the lack of a supporting legislative framework, and the possible disparities in domestic laws.

3. There was wide support for that proposal recognizing the implication of cloud computing, particularly for small and medium-sized enterprises.[1] However, it was suggested that caution should be taken to avoid engaging in issues such as data protection, privacy and intellectual property, which might not easily lend themselves to harmonization and might raise questions as to whether they fall within the mandate of the Commission. It was also stressed that work already undertaken by other international organizations in this area, by the OECD and APEC for example, should be taken into consideration so as to avoid any overlap and duplication of work. It was also suggested that a compilation of best practices might be premature at the current stage. Subject to those comments, it was generally agreed that the mandate given to the Secretariat should be broad enough to enable it to gather as much information as possible for the Commission to consider cloud computing as a possible topic at a future session.[2]

4. With the view of providing assistance to the Secretariat in its preliminary work on the subject, Canada has prepared this document to underpin the relevant issues for review by UNCITRAL. The document was prepared in consultation with experts in the field and expands on the issues identified by the Canadian proposal in relation to the provision of cloud computing services.

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[1] A/69/17 — Report of the United Nations Commission on International Trade Law, forty-seventh session (7-18 July 2014) , at paragraph 147.

[2] Idem, paragraphs 147 and 150.

Part I: Cloud computing, risks and benefits

A. What is cloud computing?

5. Cloud computing can generically be defined as computing services (e.g., data hosting or data processing) over the Internet.[3] It requires some form of controlled access to the computing functions, such as restricting access to the employees of a business. What is often difficult for the layman to conceptualize is that it involves a variety of configurations of computer hardware (or group of computing hardware) called servers. Physically, the pool of hardware resources is provided by several servers and networks located in various places. Typically, once individual users have been granted access, they can use the servers' processing power to run an application, store data, or perform other computing tasks. It is described as a "cloud" because computing functions are not performed exclusively on a personal computer, but elsewhere on servers through an Internet connection.

6. The span of cloud computing services available in a given location can vary because local applicable laws (e.g., government regulation of personal information held by public entities) require data to be physically hosted in specific locations, often within the jurisdiction of the service applicant, or because of the quality of the information and communication technology infrastructure that is available in that given location. In the majority of jurisdictions, there are limited restrictions imposed by law or by the local infrastructure and the limits that exist usually stem from how much the customer is ready to pay or from the inability of potential clients to fully grasp the potential cloud computing represents for them.

7. Cloud computing features are: on-demand self-service, network accessibility, resource pooling, elasticity and scaled service. On-demand self-service means that the service is available at any time on demand and without the need for human involvement by the service provider. Network access usually means that the cloud is available through Internet connections. Pooling means that the computing capacity of the service providers are not attributed specifically to each user, but that computing resources of the service provider are available for use in their unlimited capacity to all users. This latter aspect is referred to as the elasticity of the service. Services are scaled and adapted to the needs of each client, large or small.

8. From an economic perspective, cloud computing provides the ability to access IT resources on demand without the need for significant capital expenditure. It thereby significantly lowers upfront capital investment required from small businesses. Cloud computing is thus an important element for businesses in obtaining a competitive advantage or to be on a level playing field with other market participants. Cloud computing itself is a new form of IT activity and recent figures show that it is becoming an important sector of business activity.[4] Beyond that, one must recognize that innovation is likely to be stimulated by cloud computing platforms as was the case in recent decades for other forms of IT solutions. Cloud computing facilitates online collaboration on a global scale which is recognized as a tool facilitating innovation and economic growth.[5] By leveraging cloud computing solutions, SMEs save on investment costs and, at the same time, benefit from gaining access to cutting edge technology and services, including software updates.

9. From a technology perspective, while cloud computing technology is widely available and used in developed countries, important challenges still need to be overcome for similar level of cloud computing technology to be widely accessible in many developing countries. In particular, the availability of broadband network infrastructure remains a challenge in many developing countries or the cost of access

[3] The provision of cloud computing services is not restricted to online Internet but can also be offered on closed network.

[4] World Economic Forum, "Advancing Cloud Computing: What to Do Now?, Priorities for Industry and Governments", 2011, p. 1.

[5] OECD, "Cloud Computing and Public Policy", Briefing Paper for the ICCP Technology Foresight Forum, 14 October 2009, para. 4.

to broadband network is comparatively high for local businesses in these countries. The role of policymakers in fostering broader access to cloud computing and the advantages for developing countries of cloud computing have be reviewed by a number of development organizations.[6]

(a) Various existing models and characteristics

10. Given the wide variety of services offered and the technologies used to deliver the services, it is useful to categorize existing forms of cloud computing.[7] Typically, cloud services are divided into three categories[8] varying from the supply of "raw" computing capacity to an "off-the-shelf" software:

(i) Infrastructure as a service (IaS)

11. IaS is the provision of cloud services where an organization outsources the resources and equipment used to support virtually any computing operations such as virtual server space, network connections, bandwidth, IP addresses and load balancers (a computer networking process distributing workloads across multiple servers). The client is given access to the various components online in order to build its own IT platforms. This service is often used by enterprises and is paid on a per-use basis.

(ii) Platform as a service (PaS)

12. PaS is a category of cloud computing service that provides a platform and environment to allow developers to build applications. It allows users to create software applications using tools supplied by the provider. Depending on the service providers and the sophistication of the client, PaS services can consist of preconfigured features that can be selected on the basis of the client's requirements. It can also consist in the provision of packages of services or applications depending on the needs or the expertise of the client.

(iii) Software as a service (SaS)

13. SaS is the category of cloud computing services most typically used by individuals for personal needs. Consumers are able to access software applications over the Internet, which are readily accessible and usable for personal consumption. Google and Microsoft Office are examples of SaS. Business can also use SaS for a broad range of needs, including accounting and invoicing, sales numbers monitoring and tracking as well as the communications generally (Internet presence via existing platforms and e-mail messaging systems). SaS is essentially a form of software-on-demand. Instead of purchasing software for installation onto computers or networks as traditionally done, software applications of the service providers are accessed. SaS users therefore do not need to acquire specific software and are not responsible to pay the corresponding IP rights.

B. Benefits of using the Cloud

14. The benefits of using cloud computing are multiple and for each business will depend on its activities and on whether cloud computing can contribute to lowering the cost of the goods or services it produces or to marketing its products more

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[6] Cloud computing provides a very effective means for organizations and consumers in developing countries to access powerful computing resources at low cost. However, some challenges must be addressed by policymakers: (i) expanding fixed and wireless broadband access in developing countries; and (ii) spurring the development of cloud computing to take advantage of cloud computing resources to stimulate economic growth and enhance educational capabilities. See UNCTAD, Information Economy Report 2013, "The Cloud Economy and Developing Countries", 2013.

[7] This text does not deal with the distinction between public and private clouds because it would go beyond the scope of this preliminary analysis. It is however acknowledged that public clouds often bring risks that can be systemically different from the relative secure private cloud.

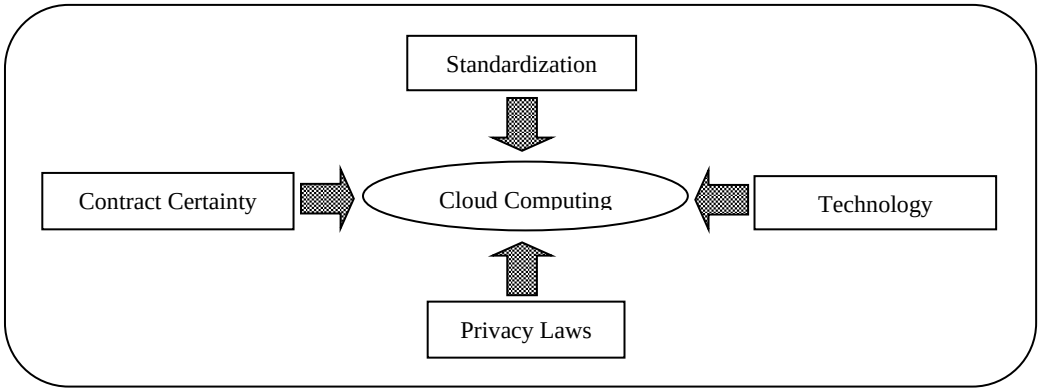
[8] OECD, "Cloud Computing and Public Policy", Briefing Paper for the ICCP Technology Foresight Forum, 14 October 2009, para. 16.

effectively. The benefits can range from increased security and user friendliness to cost savings and the creation of innovative new products and new market opportunities. What is important in order to fully assess the impact of the Cloud on international trade is the economic spin-off that results from cloud computing and the impact at a macroeconomic level on businesses. Cost savings and the opportunities for innovation that cloud computing brings to small and medium-sized enterprises stand out as important benefits.

15. More generally, it has been said that the economic benefits at the microeconomic level of using the Cloud are: an increase in productivity, economies of scale, reduced operating costs, reduced capital expenditures, greater access to markets in a time efficient manner, increased leverage through the use of an organization's information and data, improved IT security, new business opportunities, reduced initial capital investment for start-up businesses and a positive effect on entrepreneurship.[9]

16. From a macroeconomic perspective, the development of cloud is a function of four key factors: the availability of technology; contractual predictability and certainty surrounding the use of cloud; the existence of standards allowing, among other things, the interoperability of the cloud products and interfaces as well as better definition of the service provided; and the existence of adequate legislation on privacy and on the protection of confidential information. These factors are illustrated in figure 1.1 (below).

Figure 1.1
Key elements for a conductive cloud computing environment



17. An optimal environment will be found in a jurisdiction where all four factors are present. Jurisdictions performing well in terms of making these four factors available will be creating an environment favourable to the Cloud and therefore to commerce. The availability of a good cloud environment domestically will facilitate the emergence of competitive local businesses which will in turn offer goods and services at competitive prices on international markets.

18. Legal issues affecting cloud computing are not assessed from the standpoint of necessarily creating an incentive for business to seek cloud computing solutions, but rather to review whether the legal environment, because of its deficiencies or because of unnecessary legal restrictions, does not allow cloud computing-related benefits to be fully unlocked. Indeed, the economics of a particular business sector and market forces should attract the required IT solutions. The legal environment should not be promoting nor impeding the adoption of IT solutions. It should be neutral, leaving businesses with the decision of what the best-suited IT solution is.

[9] ICC, Business views on regulatory aspects of cloud computing, February 2012, p. 4.

C. Risks associated with the Cloud

(a) General — Risk differentiation from traditional market conditions

19. The Cloud can be considered a form of outsourcing. For customers, it means that the risks that exist with any outsourcing are also present with cloud computing. For example, will the computing services received be adequate to support the enterprise's needs and to ensure that the enterprise's output quality is maintained? From the service provider's perspective, in addition to the risk associated with whether it can provide the services in accordance with the terms of the contracts, a number of other risks ought to be assessed prior to concluding the agreement. For example, what implied terms are there for this type of service? What happens in cases where the data is accidentally lost, service is interrupted for reasons outside the control of the service provider, or the service is used in the pursuance of the client's criminal activities?

20. Outside these common considerations for assessing business risks, there is a fundamental difference between the Cloud and the traditional manner of outsourcing services. The service is virtual; that is, there is no physical presence of the service provider at the user's premises. To some extent, the service provider itself is virtual. While cloud computing does not create aggregate risks or undiversifiable risks (i.e., a risk vulnerable to events affecting aggregate outcomes such as broad market returns, which are caused, for example, by natural disasters), it does potentially create a category of transversal risks which are unique. The risks are transversal because the data off-loaded on the Cloud may cover a very wide range of the users' activities and, in most situations, the risks are further amplified because of the impossibility of knowing where the data is hosted or processed. This situation prevails because, under existing cloud computing models, data is regularly transferred across borders and processed in various locations around the world depending on the availability of computing capacity. Transversal risk factors are not always present in traditional business conditions, but are almost always a component of cloud computing services.

21. For the purpose of this analysis, economic, security and legal risks are the most relevant and therefore the subject of detailed analyses. It should be noted however that risks are difficult to categorize. A legal risk can easily represent an economic risk as well because of its potential financial impact on the business and its activities. Similarly, a security risk will also represent an economic risk. Environmental and social risks have not been assessed for the purpose of this analysis.

(b) Economic risks

22. The economic benefits of using the Cloud arise from economy of scale one can achieve by pooling computing resources within the control of one supplier who then offers them at discounted prices to multiple users.[10] Indeed, from an economic perspective, the risks with cloud computing include considering the opportunity cost of not using the Cloud. Maintaining networks, updating software and storage capacity, not to mention adequate security features, are all costly.[11]

23. Traditional economic risks that exist for outsourcing services are also present in the cloud environment. For example, outsourcing internal functions of a business on the basis of incomplete assessments as to the needs and the potential cost savings can result in financial losses. It cannot be said that cloud computing is always a better option. Cost-benefit analyses must be conducted. Needs and objectives must be established at the outset before outsourcing computing functions. The most common economic risks are: acquiring cloud computing services that are unsuited to the business needs or the business model, loss of productivity in the transition period or

[10] OECD, "Cloud Computing and Public Policy", Briefing Paper for the ICCP Technology Foresight Forum, 14 October 2009, para. 9; ICC, Business views on regulatory aspects of cloud computing, February 2012, p. 4.

[11] According to some sources, database management currently accounts for more than 25 per cent of most companies' IT budgets, The Global Information Technology Report 2012 , p. 91.

loss of clients not interested in updating their practices to meet the Cloud's requirements.

24. Data is often among a business' most valuable assets. Preventing its loss and the consequences of that loss are therefore key in limiting risks for a business. The risks increase when data is stored and transmitted via the Internet and not in closed systems. The growing use of cloud computing has contributed to increased data processing outside of the comparatively secure business premises. The risks also vary depending on the nature of the information that is contained in the data. Some of the most significant economic risks are: lost data; loss resulting from unauthorized use of data; business interruption or disruption of activities; breach of service agreements; and loss of revenues because of reputational damage.

25. Increasingly, businesses holding trade secrets or sensitive client information devote time and resources to the development of good practices in IT governance. IT governance falls under the mandate of a company's officers and the board of directors. Widely accepted practices on corporate governance now require IT risks and permanent monitoring and assessment to form an integral part of an organization's risk management plan. Their adoption and implementation fall under the purview of the board of directors and the corporation's officers. IT governance represents an expense for businesses which could be offloaded to cloud service providers at a lower cost. That being said, failure to adopt and implement adequate IT governance can expose the business to lawsuits if affected parties can demonstrate the business was negligent. Again, cloud computing might be part of the answer and represent a significant economic advantage for the businesses using it.

26. Moreover, cloud computing has made available efficient tools and processes to analyse data at a small cost and opens up the possibility of extracting important information from data (such as purchase patterns, geotagging, in-depth analysis of clients' behaviour through algorithms, etc.) resulting in business opportunities. The result is more productivity and greater competitiveness that create substantial economic and social value for companies, governments, and consumers. From an economic perspective, the opportunity cost for a business not to use cloud processing could be significant.[12] For example, for a small-sized enterprise, the inability to match its own business data, such as customer information, business cycles, or product specifications, to relevant business sector studies and surveys or analytical processing schemes can prevent a business from adapting sales and marketing strategies to match potential clients' needs in a manner that is available to others in the same business sector.

(c) Security risks

27. The security of cloud computing is an important differentiating factor among cloud service providers and plays a role in decisions to migrate information systems to cloud computing environments.

28. This risk assessment is dependent on the circumstances and the business that is considering using cloud computing as an enhanced IT system security. Some businesses, in particular small and medium-sized enterprises, may have unreliable computer systems and security protocols or may not have the proper staff to ensure the existing IT systems are used in a safe and appropriate manner.[13] For these organizations, the opening up of the IT system to the Cloud does not necessarily constitute an increased risk, but rather access to enhanced security. The benefit for any given organization of the enhanced security cloud computing can offer will depend on the nature of the information it holds. For businesses hosting limited sensitive information, cloud computing can also limit risks by closing access to forms

[12] Consider for example "Rewards and Risks of Big Data", The Global Information Technology Report 2014.

[13] For example, standard security protocols require that passwords be relatively sophisticated using a mix of alphanumeric characters with special symbols (e.g., #,$ or %). In addition, after a limited number of attempts with the wrong password, the access is locked. Businesses may exceed minimum security requirements considered adequate in their fields or be under protected.

of hacking which are not directed to obtaining confidential information, but merely to disrupting business activities by tampering with its IT capability.

29. The acquiring business must assess the IT solution chosen prior to entering into a contract. This requires an exchange of information between the service provider and the business. This information-sharing is crucial, but there is also a need to ensure that the cloud services client has the ability to assess the security level of the provider's environment. A lack of information sharing or the inability of the acquiring business to assess this information is a serious potential threat for clients using these services.

30. The security risks associated with cloud computing stem primarily from the following threats:

Loss of control — (i.e. a client's decision to migrate all or part of an activity to cloud computing implies relinquishing partial control to the service provider.) Once the data has been given to a cloud solution provider, it becomes difficult for the client to verify whether it is being handled adequately in terms of its processing or retention. This loss of control varies depending on the type of cloud service.[14] The loss of exclusive control may result in an inability to deploy the necessary measures to guarantee data integrity and confidentiality.

Service provider's inconsistent or inappropriate security practices — Related to the preceding is the risk associated with the provider's security practices. Inadequate practices will lead to more significant risks for the client receiving the cloud services. Some inadequate practices may be related to operations control, insufficient authentication procedures, unavailability of encryption or weaknesses associated with the data retention process.

Vagueness in sharing roles and responsibilities — Various stakeholders are involved in a cloud solution model: the service provider, the service consumer, the client's computer administrator responsible for client security, third parties whose information is held by the business, etc. Any ambiguity in defining the roles and responsibilities related to data ownership, access control, maintenance of infrastructure, etc. may result in security risks. The failure to clearly assign responsibilities will have a higher impact where a third party's servers are used.

Unauthorized access to cloud services — The program interface (API) is the software layer (middleware) between the infrastructure and the service user. Particular attention must be paid to interface control processes when entering identification and authentication data. Remote connection provides opportunities for cyber pirate attacks such as interception of communications, including passwords, phishing, fraud and the exploitation of software vulnerabilities.

Cross-border data flows — Breach of data confidentiality is a common risk for users of cloud computing. The lack of information about where the data is located and hence the applicable legislation and regulations as well as the number of stakeholders in a cloud computing solution accentuates this risk. Protecting sensitive, personal data as well as respecting the right to privacy is particularly difficult in infrastructures that are shared and potentially accessible to local governments. This situation also brings jurisdictional issues given the location of the data.

Data preservation — Data preservation includes a set of risks in relation to the loss of data, but also in relation to maintaining the integrity of the information. In addition, electronic documents often require that specific measures be taken

[14] For example, in the case of IaS, only the management of equipment and the network is delegated to the provider. Unless it is very specific about the type of infrastructure sought, IaS is the cloud service that offers the lowest degree of dependency. With respect to a PaS solution, the link between the use of the service and the technological platform of development ensures that data conversion or exportation is difficult. Risks are therefore in relation to the control as well as conversion and extraction of information. With respect to SaS, control over the applications as well as the other elements is delegated.

regarding data integrity in order to be admitted in evidence. Cloud computing may accentuate the difficulty of taking adequate measures on this point. Some customers may require to have the ability to obtain evidence of satisfactory data protections through periodic audits.

Loss or disclosure of information — The loss of an encryption key or a user access code is one of the common risks associated with causing the loss or disclosure of information. A common feature is for the service provider to notify the customer of accidental disclosures of information when known.

Insufficient silos in shared environments (permeability) — The organization of cloud based resources allows different cloud service consumers to share the same infrastructure. The primary concerns stemming from this organization are related to silo architecture, isolation of resources and data segregation. Cloud computing in a public or semi-private form shares the services offered to the entire client base, creating a risk of data permeability among the various clients.

Unauthorized access during hosting and processing — Virtualization technology is the basis of cloud infrastructures. Hypervisors manage virtual functions co-hosted on the same physical server by sharing of the central processing unit and memory. The failure to prevent hypervisor attacks causes unauthorized access to the memory of the various virtual functions, which would otherwise remain separated, and jeopardizes the entire infrastructure.

Delegation of governance — IT governance falls under the mandate of a company's officers and the board of directors. Their adoption and implementation fall under the purview of the board of directors and the corporation's officers. A risk with the use of cloud computing solutions is that responsibilities in relation to the IT governance end up being partly delegated to the cloud service provider.

31. Given these cyber risks, there is a demand for insurance coverage for the exposure to potential losses of companies. The complex and somewhat evolving nature of cyber risks means that highly specialized expertise and experience are needed to develop models for new insurance products to adequately cover these risks or that insurance costs are high.[15] The cost of these insurance products is passed on to businesses and consumers.

(d) Legal risks

32. The legal risks associated with a commercial venture can only be adequately assessed if the matter which is the subject of the contract is known (or can be known if questions are being asked and answered adequately). An added difficulty caused by the novel nature of cloud computing is that a prospective cloud customer, or his counsel, may not always be in a position to readily assess or determine the issues that need to be considered and, therefore, the questions to ask or the requirements to be requested from the service provider.

33. In recent years, the emergence of "international standards" put forward by trade associations and non-governmental membership organizations have contributed to addressing and limiting legal risks associated with the Cloud. These standards are incorporated by reference in contracts between the cloud service provider and customers and represent an off-the-shelf solution to a number of cloud computing risks.

34. The following paragraphs describe the legal risks from the perspective of each cloud computing participant. It goes without saying that many of these risks are similar to those of any contractual dealings, but IT services are somewhat of a different category because of their nature. The breadth of services covered — from advertisement and public presence on the Internet to the management and protection

[15] World Economic Forum, "Advancing Cloud Computing: What to Do Now?, Priorities for Industry and Governments", 2011, p. 10 and 14. Insurance products were referred to as being underdeveloped.

of confidential information — are such that they are services used as input in the provision of goods or services unlike any others. They are also used by all spheres of business and government activities. These services are far more than mere input used in production: they also involve the protection of confidential information and business secrets as well as the image of the business and are the general records of all the activities of the business.

(i) For cloud service providers

35. Entering into a contract for service for a cloud computing supplier will entail varying levels of risks and difficulties. Standardized services, typically with respect to SaS agreements, will be less risky and relatively easier to negotiate, because they will involve a common contract with standard clauses.

36. In other situations, for example when contracts are customized to the needs of a specific client, the legal position of the cloud provider will be different. Negotiations with the customer will require more care and considerations of the legal implications of the contracts.

37. Typically, two broad categories of risk will be assessed by the service provider: first, the risks linked to inadvertent or illegal release of confidential or secret information of the client and second, the risks associated with a failure in the provision of the services, such as interruption of cloud computing services or connectivity and loss of data. In both of these categories, the risks may stem from the actions or omissions of the service provider or from circumstances outside of its control. These risks can be limited by exclusions in the service agreement or by the taking up of insurance covering these specific risks.

38. Service providers will often be familiar with one or some limited number of local laws and in particular local contract laws and privacy laws. They will therefore either choose an applicable law that provides requirements in terms of protecting the confidential information that it can meet — or that it is willing to meet — and that offers rules of construction of contracts that are predictable and acceptable for its purposes. For example, a common law concept in the interpretation of contracts is that there may be "implied terms". Courts find that in certain circumstances everything agreed by the parties is not contained in the document and some additional terms must be implied. An implied term could for example be the obligation to proceed with the utmost care with confidential and sensitive information. Similarly, a civil law jurisdiction could have specific rules of interpretation of contract which state that any ambiguity in the contractual terms ought to be interpreted against the party who drafted the terms.[16]

39. There are limits to the effects of a clause on the selection of the applicable law. First, the parties may have derogated from the applicable law by agreeing to specific terms in their agreement. Second, there may be mandatory provisions of laws that apply regardless of the existence of a clause on the applicable law. Third, the rules on jurisdiction of domestic courts and the existence or absence of a clause on jurisdiction in the contractual agreement can also affect the determination of the obligations of the parties. In some circumstances, a domestic court may choose to disregard foreign law and apply its own rules. This could be the case, for example, if foreign law is not pleaded or insufficient evidence on the content of foreign law is brought to the attention of the court.

40. A fundamental difficulty in assessing the legal risks in a contractual agreement for the provision of cloud computing is that, in a cross-border situation, beyond contractual terms agreed by the parties, a number of laws can apply even in the presence of a clause on governing law.

[16] This will be the case when the contract is considered to be a contract of adhesion for example.

(ii) For cloud service applicants

41. In the majority of situations, the cloud service applicant will be the weaker party or will be presented with a standard contract whose terms will not be open to negotiation. This will often be the case when dealing with SaS. In many situations where IaS agreements are negotiated, the parties are on a level playing field because they will both be knowledgeable about the risks and the implications of the terms of the contract. Where an imbalance between the parties exists, applicable contract laws will often provide that the contract is a contract of adhesion.

42. The most important legal risk for applicants remains not being in a position to fully assess the risks associated with the cloud computing agreement (e.g., inherent weakness of the technology being used, absence of or inadequate security features, economic risks linked to data loses or breaches, etc.). This incomplete assessment leads to inadequate terms in the contract or the absence of terms addressing specific risks.

(iii) For users

43. Users will not always be party to the cloud contractual agreement. For example, an employee of an enterprise who uses the Cloud in his capacity as employee will not be party to the contractual agreement between his employer and the cloud service provider.

44. Inappropriate use of the Cloud by an employee resulting in financial losses for the employer will usually be sanctioned according to the employment contract or the applicable contract law. The employer might be well advised to consider whether the contractual terms it uses for employment purposes are adequate to deal with reckless or ill-intentioned employees. This will be a risk for the employer because third parties will generally be seeking redress from the legal entity tasked with protecting the confidential information rather than its agent. However, if an affected third party can identify wrongful or malicious actions by an employee or agent (considered as user here) of one of the parties to the cloud computing agreement, it is possible under some systems of law to seek redress by suing the employee or agent.

45. Although this will generally not be the case under a typical cloud computing agreement, employees or agents may have personal information, proprietary rights over property, or trade secrets that are covered by the data falling under the Cloud. For example, a university enters into a cloud computing agreement for its general computer needs, including messaging, payroll and data bases, where professors save their research projects. These projects may in whole or in part belong to the professors. In this situation, a user of cloud solutions, who is not a party to the cloud computing agreement, could be affected by mishandling of data by the service provider or the university.

(iv) For third parties

46. Third parties are not directly affected by a cloud computing agreement. They are not party to the agreement. Because of the rule on the privity of contract, they only have effects among the parties. Therefore, third parties cannot require that any aspect of the cloud computing agreement be executed. For example, a third party could not exercise a contractual remedy against the cloud service provider for the failure to ensure the protection of its personal information.

47. Third parties might nonetheless be affected by practices resulting from the cloud computing agreement. Recourse against the cloud service provider will generally have to be sought through tort remedies or through legislative provisions allowing recourse against a faulty party, for example when it did not use reasonable care to protect the third party's information. However, knowing this possibility of extra-contractual claims, can the service provider limit its potential liability contractually? One manner of achieving this objective is by subscribing risk insurance covering claims from third parties in given circumstances where data was misused, lost or misappropriated.

Part II: Consideration of legal issues

A. Categories of cloud computing contracts

48. The traditional categories of cloud computing services have been described as SaS, PaS and IaS. These categories reflect the practical and technology-oriented use of cloud computing. Although relevant to the legal analysis, these categories are incomplete because they fail to identify legally relevant factors such as the creation of protected IP rights and proprietary rights. Contracts covering cloud computing services can be categorized in four groups:

(a) Common text processing and mail services;

(b) Data hosting (protection and preservation of data);

(c) Use of licensed software or database and other protected IP rights;

(d) Proprietary work product (i.e., work product resulting in shared or partial ownership of product).

49. From a legal standpoint, all four categories of contracts entail different considerations for the parties and different legal consequences. The first category is commonly used by individuals for personal needs. Contracts for office-based services of cloud-based services (e.g. e-mail, word processing, minimal storage of information, etc.) are generally basics and rely on widely available technologies and software which can be accessed using commonly available mobile devices and at low costs. Because of the scale and of the standardization of the services provided, there is often very little opportunity to negotiate agreements individually. In a business setting, this computing solution can be considered useful, for example for communications purposes, while the protection and preservation of confidential information are provided in-house.

50. In the traditional office context, companies and users rely on the integrity of their hard drives and related back-up systems. These systems are governed by warranties that may guarantee the replacement of the hardware, but usually do not guarantee the integrity of the data. This is one area where cloud computing offers significant contract benefits. While contracts for data storage are often not negotiable, there is a highly competitive market for data preservation. Companies should look for contracts that allow for data portability and export and that provide redundancy and secure data in diversified ways to facilitate data recovery. The second category therefore involves storage capacity coupled with corresponding security features for data preservation and limiting access to authorized users. There are obviously varying degrees of sensitivity of confidential information.

51. The third type of contract involves the use of licensed material. This will often be the ability to use databases. A number of professional service providers, for example, use databases to extract information or to proceed to analyses which are subsequently incorporated in the service provided. This type of contract therefore covers both the ability to use IP-protected information and to disseminate part of it in the output of the subscriber. At times, the IP owner will require as part of the terms and conditions that reference be made to the IP owner in the output of the users.

52. The three types of contract described so far are generally SaS contracts. They generally involve limited work product that is IP-protected. The fourth type of contract results in an integrated use of the computing resources of the service provider as well as the input of the user, which become part of the output. The fourth category entails the creation of work product and associated proprietary and intellectual property rights. A lack of standards and a lack of widespread adoption of existing standards in the case of platform as a service (PaS) can create a situation where the output cannot be used without the application programming interfaces (APIs). It means that applications or products developed on one platform cannot easily be migrated to another cloud host or be used on any computer. As a consequence, once an organization has chosen a PaS cloud provider, it is locked-in. In some situations, the output can essentially not be used without prior consultations with the rightful

proprietary owner of the platform. Promoting open standards for APIs and further work on interoperability could limit the situations where proprietary rights can be asserted by cloud providers.

53. While some providers, in particular large ones, can do little to customize mass offerings beyond providing menu-driven choices (e.g., "web wrap" and "click through" agreements found on websites for cloud services with standard security features), customers should be mindful that the four types of contracts entail different consequences which need to be carefully assessed at the outset.

54. Most cloud computing services will contain some features that can be associated with one or more types of contract. Note that the delivery of cloud computing solutions varies constantly and these models are evolving, are not always fully demarcated and may overlap.

B. Contractual issues

(i) Application of private international law criteria

55. The law applicable to contractual obligations is the law selected by the parties, unless the particular contract falls under a category for which rules of law impose a specific applicable law (e.g., in some aspects relating to family property). Provided the intention expressed is bona fide, and provided there is no reason for avoiding the choice on grounds of public policy, the intention of the parties as to the choice of law prevails.

56. In the absence of a choice of law by the parties, the intention of the parties will be ascertained by the intention expressed in the contract itself or, in the absence of such express indications, the proper law will be determined by inference from the terms of the contract and the surrounding circumstances (which latter connecting factors are known as the law that has the "closest and most real connection" with the transaction). However, traditional factors may not be readily identifiable for a given cloud computing contract. For example, where was the contract negotiated and signed in a virtual environment? Where is the contract expected to be performed? Where is the cloud computing service provider located?

57. These issues are of limited application to the extent that the vast majority of cloud computing contracts do provide for a choice of law. However, should there be some guidance for cases where the parties accidentally or knowingly did not select a governing law? Should there be limits to the choice of governing law?

(ii) Limitations on movement of data and control over data

58. While in traditional contracts for service, it is relatively easy to determine whether a contract has an external element. Cloud computing will often entail an international component because data will often be stored or will transit between servers located in different countries. Indeed, from a legal risk assessment perspective, parties to a cloud computing agreement and their counsel should expect an international dimension to be present.

59. Cloud computing agreements can be domestic, which means the contract, the parties and the performance of the obligations, are domestic in all respects. They can also involve a foreign element, in which case it is possible for the agreement or the legal relationship to be affected by multiple laws and for more than one court to have jurisdiction to hear disputes in relation to the contract.

60. One solution to this problem is to require that the data be retained within the jurisdiction at all times. When considered desirable, parties to a cloud computing agreement may request that data be physically stored within a specific jurisdiction with the objective of ensuring a single local law applies to the cloud computing agreement, the parties and the data. This approach has been advocated by some governments where satisfactory protections are not able to be put in place and in order to avoid the application of foreign laws to the data contained in the Cloud. However,

no contract, no matter how well drafted, can completely exclude the application of a country's laws.

61. A permutation of the above practice is to require that information transmitted outside the jurisdiction be encrypted. This clearly brings up the question of whether the encrypted information is subject to the other country's law and, if so, what practical effect this has. This practice raises the question of whether a court in the jurisdiction where the data is located may require the disclosure of the encryption key.

62. In civil and commercial matters, courts can issue an order for the production of documents actually in the possession and control of a party to the dispute. Should a cloud service provider be required to produce electronic documents falling under its control? If not, is domestic legislation providing clear guidance to that effect? Is this situation exacerbated in cross border situations?

(iii) Duties and responsibilities of each participant to cloud agreements

63. What are the duties of the parties to a cloud computing agreement? Do they include the obligation to preserve data and redundancy? Are the parties limited to duties specifically mentioned in the cloud agreement? Do cloud service providers have the obligation to perform the contract according to recognized business practices and if so, what is the content of these practices?

(iv) Allocation of obligations, risks and liabilities under the contractual framework

64. In general, the respective obligations of the parties are laid out in the contract governing their relationship. Data storage and transfers from one jurisdiction to another as part of resource management often result in challenges and risks which cannot be easily allocated at the outset. The jurisdiction where the server on which data is stored is not known to the cloud user and, as a result, the customer and the service provider have difficulty in thoroughly checking and controlling the data handling practices and in ensuring compliance, not only with the terms of the contract, but also with the various laws that can apply. Parties can provide specific checks and rely on validations processes to determine where data is located.

65. In the absence of any term in the contract for service, a person contracting to do work and supply materials warrants that the materials or services will be a sufficient quality and reasonably fit for the purpose for which they are contracted, unless the circumstances of the contract are such as to exclude any such warranty. Are there implied terms under a cloud contractual relationship? For example, does the cloud service provider warrant that it will comply with any applicable local laws where the data could be located? If the parties agree that the data should be hosted in specific geographic locations, does the cloud service provider warrant that it will be the case and that servers used for storage or computing purposes will be located exclusively in the designated jurisdiction?

66. Is it an implied term of the contract that the cloud provider is required to maintain control over data?

67. Are limitations of liability for data losses or corruption enforceable or are they considered unconscionable or unenforceable because contrary to the purpose of the contract?

(v) International standards incorporated by reference in cloud computing agreements

68. The emergence of "international standards" put forward by trade associations and non-governmental membership organizations may have contributed to addressing and limiting risks associated with the Cloud in particular for small and medium-sized enterprises which may not always have the resources or the expertise to consider all possible cloud-related issues. Should UNCITRAL consider whether such standards can be incorporated into best practices? Are these standards referred to in contracts between cloud service providers and customers effective and binding in the various systems of law?

(vi) Data hosting and proprietary rights

69. In many systems of law, the public and peaceful possession of personal property amounts to a presumption of ownership. Does this presumption cause difficulties in the world of cloud computing? Is the cloud service provider in possession of the data of its customers? What happens in situations where the proprietary rights over data or software have not been clearly established by the parties to the cloud agreement in particular in situation where IaS is being supplied?

70. Given the proprietary rights of customers over data maintained by the cloud service provider, should the service provider be required to surrender data to its legitimate owner upon demand? Would this obligation also include the obligation to erase or otherwise eliminate any back-up copies of the data?

(vii) Intellectual property

71. A number of clauses developed by cloud service providers specify that the client retains its intellectual property rights over the content of the information transferred to the provider. Sometimes, however, the provider gives itself a licence, sometimes universal and unlimited, to use, host, store, reproduce, modify, communicate and distribute the content.

72. Compliance with intellectual property rights is another issue that the client should be concerned about. Because of the nature of the Cloud, in some cases it can result in hosting being done in various and sometimes unknown locations. In that context, it could be difficult to predict what laws will be applicable given that intellectual property rights are often defined by reference to the laws in the jurisdiction. In addition, what constitutes a violation of copyright in one country may not be in another.

73. Determining the owner of the copyright where new works have been created in the context of cloud services is also an issue that can be considered.

(viii) Jurisdiction

74. What constitutes a sufficient connection to a given jurisdiction for a court to entertain a contractual claim arising out of a cloud computing agreement? To what extent should an exclusive choice of jurisdiction be recognized and enforced?

75. In the absence of a clause on jurisdiction where can the parties to the contract bring an action or seek provisional protection measures? What should be the basis for such exercise of jurisdiction?

Conclusion

The information provided in this note is aimed at advancing the review of legal issues affecting the provision of cloud computing services so that a Working Group can use this preparatory work in developing recommendations. The Commission may wish to acknowledge the issues raised in this note and mandate a Working Group to review these issues, as well as others identified in the course of its deliberations, and to recommend best practices where needed based on evidence of absence of legal recourses, perceived imbalance between the rights and obligations of cloud computing participants or other evidence. The Secretariat in order to assist the Working Group could conduct research on contractual issues that arise in the provision of cloud computing services and explore possible solutions in relation to some or all of these issues with the view of fostering international trade. Experts meetings and consultations could also be used to gather additional information.

Annex I: Current issues in cloud computing

76. International organizations have covered a wide-ranging number of issues relating to cloud computing. Their analyses constitute a matrix of information helping to understand and develop cloud computing and assist in delimiting critical legal issues in relation to the provision of cloud services.

(a) United Nations Centre for Electronic Business and Trade Facilitation (UN/CEFACT)

77. The UN/CEFACT, a subsidiary body of the United Nations Economic Commission for Europe (UN/ECE), supports activities dedicated to improving the ability of business, trade and administrative organizations, from developed, developing and transitional economies, to exchange products and relevant services effectively. The principal focus is facilitating national and international trade transactions through the simplification and harmonization of processes, procedures and information flows, and so to contribute to the growth of global commerce. A number of specifications and standards have been endorsed by CEFACT such as the ebXML global standards for exchanging business messages, establishing trading relationships, communicating data in common terms, and defining and registering business processes. The endorsement of these standards or processes can impact business practices and limit the issues of interoperability, and ultimately litigations.

(b) World Customs Organization

78. The World Customs Organization (WCO) is the only intergovernmental organization exclusively focused on customs matters. The work of the WCO covers the development of global standards, the simplification, harmonization, and modernization of customs procedures (including promoting the utilization of IT methods), trade supply chain security, international trade facilitation, the enhancement of customs enforcement and compliance activities, anti-counterfeiting and piracy initiatives, public-private partnerships, integrity promotion, and sustainable global customs capacity-building programmes. The WCO also maintains the international Harmonized System goods nomenclature and administers the technical aspects of the WTO Agreements on Customs Valuation and Rules of Origin. Additionally, the WCO and UNCITRAL are cooperating, with other international organizations, in a major programme to address the global legal issues related to the international Single Window.

(c) UNCTAD

79. The United Nations Conference on Trade and Development has developed considerable expertise in the customs area within its mission related to trade development. Numerous countries and economies have implemented its Automated System for Customs Data (ASYCUDA).

80. In 2013, UNCTAD released the *Information Economy Report, The Cloud Economy and Developing Countries*, which takes stock on the development of cloud computing in developing countries. It reviews the conditions required to foster the cloud computing economy and stresses the consequences for failing to do so. This document is seminal, in particular because of its approach to the assessment of what the cloud computing economy is, as well as what ought to be considered in terms of infrastructure, policy and action to develop this field.

(d) International Chamber of Commerce

81. The International Chamber of Commerce (ICC) is the international private sector body that represents the interests of the global business community. The goal of the ICC is stimulating the global economy by setting rules and standards, promoting growth and prosperity, and spreading business expertise. The ICC has developed a range of Model Contracts and Agreements that cover the business components of the supply of goods as part of an international sales contract, for

example its Model International Sales Contract, Model Commercial Agency Contract and Model Distributorship Contract.

82. The ICC Commission on the Digital Economy has recently published a paper reviewing the *Business Views on Regulatory Aspects of Cloud* recommending that governments be encouraged to use the regulatory powers they already possess in order to improve trust and understanding in the cloud services market. The paper concludes that risks faced by businesses and consumers when dealing with cloud-based services are generally the same as those faced in more traditional communications and business environments.

(e) The Organization for Economic Cooperation and Development

83. The Organization for Economic Cooperation and Development (OECD) is an international body comprised of 30 member countries. The goals of the OECD are to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist the economic development of other countries and economies, as well as to contribute to growth in world trade. Important contributions have been made in relation to cloud computing by the OECD, in particular with respect to recommendations and best practices in e-commerce:

- OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980)
- OECD Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security (Security Guidelines) (2002)
- OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication (2007)
- OECD, Cloud Computing: The Concept, Impacts and the Role of Government Policy (2014)

The most recent document, *Cloud Computing: The Concept, Impacts and the Role of Government Policy*, outlines possible government roles in terms of policies in relation to cloud computing.

(f) The Hague Conference on Private International Law

84. The Hague Conference on Private International Law is an intergovernmental organization whose purpose is to further the progressive unification of the rules of private international law. The results of its work include multilateral treaties in the fields of international legal cooperation and litigation and of international commercial and finance law. Recent work at the Conference did not address cloud computing specifically. Existing conventions opened for signature and ratification may be relevant in the context of cloud computing, such as the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and the Convention of 30 June 2005 on Choice of Court Agreements. In addition, the current work of the Hague Conference on a convention for the recognition and enforcement of judgements could impact cloud computing agreements and litigation.

(g) World Intellectual Property Organization (WIPO)

85. The World Intellectual Property Organization is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest.

86. WIPO is consistently monitoring the application of existing international conventions protecting intellectual property in electronic commerce.

(h) Asia-Pacific Economic Cooperation (APEC)

87. The Asia-Pacific Economic Cooperation, or APEC, is a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. APEC is an intergovernmental grouping that operates on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants.

88. APEC has long been committed to promoting Internet economy since the adoption of the APEC Blueprint for Action on Electronic Commerce at its annual Leaders' meeting in 1998 and the establishment of the APEC Electronic Commerce Steering Group (ECSG) in 1999, aiming to promote the development and use of electronic commerce by creating legal, regulatory and policy environments in the APEC region. In 2014, APEC continued to carry out work on promoting the Internet Economy by releasing the Concept Paper "Developing the Internet Economy through Enhanced ICT Cooperation" in Ningbo, People's Republic of China. The Data Privacy Subgroup (DPS) also reviews interoperability of the APEC and EU data privacy regimes.

(i) International Conference of Data Protection and Privacy Commissioners

89. The International Conferences of Data Protection and Privacy Commissioners bring together privacy Commissioners from countries around the world and adopt resolutions calling for best practices in the protection of personal data and confidential information.

(j) World Trade Organization (WTO)

90. The Declaration on Global Electronic Commerce adopted by the Second (Geneva) Ministerial Conference on 20 May 1998 urged the WTO General Council to establish a comprehensive work programme to examine all trade-related issues arising from global e-commerce. The General Council adopted the plan for this work programme on 25 September 1998, initiating discussions on issues of e-commerce and trade by the Goods, Services and TRIPS (intellectual property) councils and the Committee on Trade and Development.

F. Note by the Secretariat on possible future work in the area of online dispute resolution - Proposal by Israel

(A/CN.9/857)

[Original: English]

In preparation for the forty-eighth session of the Commission, the Government of Israel submitted to the Secretariat a proposal in support of future work in the area of online dispute resolution. The proposal was submitted to the Secretariat on 12 June 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Over the last few years, substantial efforts have been made by UNCITRAL Working Group III to develop Online Dispute Resolution (ODR) Rules for online cross-border B2C and B2B transactions. The key issue revolved around the scope of application of the ODR Rules, specifically: whether and how the "arbitration" stage in the Rules can or should apply to B2C disputes where the consumer's home jurisdiction does not recognize pre-dispute arbitration agreements by consumers, and what alternative, if any, would be appropriate. Legal questions surrounding this issue have not yet been resolved and it is unclear whether such resolution is achievable in the near future. Various proposals have been put forward, ranging from limiting the scope of the ODR Rules to closing the Working Group altogether.

While the impasse at the Working Group persists, the need to provide a coherent, fair and efficient legal framework for B2C and B2B cross-border online transactions remains highly relevant, as the volume of cross-border online transactions continues to grow.[1] While acknowledging the continued relevance of proposals for ODR Rules still on the table and the work achieved so far by the Working Group, a new approach is warranted in order to address this need. Therefore, rather than terminate the activities of the Working Group or revert again to the Working Group for deliberation on the outstanding issues, it is suggested to shift the focus away from the ODR Rules and to direct the Working Group's efforts to one or more aspects of online dispute resolution other than procedural ODR Rules.

To that effect, and without precluding other possible areas of work for the Working Group, it is proposed that the Commission, at this time, instruct the Working Group to develop a non-binding instrument for use by ODR providers and neutrals in order to assist and support ODR practitioners. This instrument could address various agreed-upon issues, both with respect to the general functioning of ODR providers (independence, transparency, selection of qualified neutrals, etc.) and to case management (roles and responsibilities of neutrals, handling of evidence, communication with the parties, etc.). By enhancing the reliability, impartiality and efficiency of ODR proceedings, such an instrument would contribute to the protection of the businesses and consumers involved. The instrument could draw from previous deliberations of the Working Group on this matter, as well as from the input of leading practitioners in the field.

As with existing instruments that cover comparable matters, such as the UNCITRAL Notes on Organizing Arbitral Proceedings,[2] this instrument would make clear that it does not impose any legal requirement or substantive norms binding on ODR administrators, providers, neutrals or the parties to the dispute. An ODR provider or neutral could refer to this instrument at its discretion and to the extent it sees fit, using it as a practical toolkit for developing appropriate internal mechanisms and handling

[1] UNCTAD, Information Economy Report 2015 – Unlocking the Potential of E-Commerce for Developing Countries (http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf), p. 30.

[2] Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, United Nations Doc. A/CN.9/WG.II/WP.186.

ODR cases. In addition, this instrument could enable ODR providers to signal their commitment to applying a non-exclusive set of recommended practices endorsed by UNCITRAL, which is recognized as the core legal body of the United Nations in the field of international trade law.

Such an instrument would not purport to resolve the complex scope of application and choice of law questions that were raised in the course of discussions regarding the ODR Rules and would therefore steer clear from the differences in approach concerning B2C disputes, including in regards to arbitration and non-binding recommendations.

As such, the mandate to develop this instrument would allow the Working Group to address the use of ODR in B2C and B2B cross-border transactions more generally, and would enable UNCITRAL to provide a coherent framework for an important and rapidly emerging field of activity. In essence, despite the shift in emphasis, this would merely present a different application of the original mandate of the Working Group.[3]

It should be noted that pursuing this suggested direction would not preclude revisiting the possibility of working on ODR Rules in the future.

[3] Report of the United Nations Commission on International Trade Law, 43rd session, United Nations Doc. A/65/17, para. 257. The mandate, determined in 2010, reads as follows: "*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 prepared should be decided by the working group after further discussion of the topic.*"

G. Note by the Secretariat on possible future work in the area of online dispute resolution - Proposal by Colombia, Honduras and the United States of America

(A/CN.9/858)

[Original: English]

In preparation for the forty-eighth session of the Commission, the Governments of Colombia, Honduras and the United States of America submitted to the Secretariat a proposal in support of future work in the area of online dispute resolution. The proposal was submitted to the Secretariat on 19 June 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

After five years of meetings, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) remains at an impasse arising out of fundamental differences in approach among States regarding protection of consumers in cross-border electronic commerce transactions. We consider it very important, however, that the Working Group produce a tangible work product that (a) supports in general the use of online dispute resolution and (b) provides useful information on good practices in online dispute resolution in a factual and balanced manner. Accordingly, we propose that the Commission direct Working Group III on Online Dispute Resolution (ODR) to prepare Notes on Organizing ODR Proceedings. Such Notes would be similar in nature to the Notes on Organization of Arbitration Proceedings that will be reviewed at the current session of the Commission.[1] In short, we are proposing a shift in the focus of Working Group III in order to try to achieve a tangible and useful conclusion within a reasonable period of time.

Over the years, the Working Group has worked diligently to understand the different perspectives regarding online dispute resolution and to pursue agreement on model procedural rules. The status of the negotiations in Working Group III is described in the Annotations to the Provisional Agenda as follows:

> The Commission may wish to note in particular that at those sessions, the Working Group worked towards a single set of rules for the resolution of online disputes, on the basis of various proposals made during the sessions themselves. However, no consensus was reached on resolving fundamental differences remaining between States that allowed binding pre-dispute agreements to arbitrate and those that did not, despite the Working Group's strenuous efforts to this end. Accordingly, it was said that the Commission should terminate the mandate of the Working Group, also bearing in mind the Commission's earlier decisions on the allocation of UNCITRAL's resources (see under provisional agenda item 18 below). Other delegations expressed the view that the Working Group should continue to seek consensus on both existing approaches and new elements. The Working Group was also invited to engage in informal consultations before the forty-eighth Commission session to seek progress on these issues (A/CN.9/827, para. 15, and A/CN.9/833, paras. 16 and 17).[2]

We agree with the assessment that it will not be possible to reach a consensus on a single set of procedural rules for online dispute resolution in a reasonable period of time, in particular, in light of the significant disagreements among nations regarding laws or policies relating to consumers.

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[1] Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, United Nations Doc. A/CN.9/WG.II/WP. 187.

[2] Provisional agenda, annotations thereto and scheduling of meetings of the 48th Session, United Nations Doc. A/CN.9/824, para. 26 (emphasis supplied). See also Report of Working Group III on its February 2015 Session, United Nations Doc. A/CN.9/833, paras. 16-17.

As the Commission noted in establishing the ODR Working Group, "issues relating to consumer protection were difficult to harmonize, since consumer protection laws and policies varied significantly from State to State."[3] Historically, UNCITRAL and the other private international law bodies have been unable to agree on the application to consumers of a wide variety of private international law instruments, including on instruments concerning international contract law, choice of law, the recognition and enforcement of judgments, and jurisdiction. In these private international law negotiations, disagreements over consumer law issues have been dealt with in one of two ways: (1) providing in the instrument that nothing can override any provision of law from which the parties cannot derogate,[4] or (2) excluding business to consumer transactions from the scope of the instrument.[5] For example, the newly adopted Hague Principles on Choice of Law in International Contracts (2015) provides that "[t]hese Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer ... contracts."[6] The Official Commentary explains that "[t]he scope of application of the Principles is confined to commercial contracts because in these contracts party autonomy is widely accepted." The Commission will consider whether to endorse the Hague Principles at its upcoming session.

This course of action concerning the treatment of consumer issues has not proven to be acceptable in Working Group III, in part because of the high percentage of low value cross-border transactions involving consumers.

We nevertheless would like the Working Group to try to achieve a practical and useful product within a reasonable period of time, especially in view of the many years of discussions and learning that has been accumulated with respect to online dispute resolution within this Working Group. We also think that it is important for UNCITRAL to adopt an instrument in some form that will promote the use of ODR in international commerce and promote international good practices. As we have stressed several times, a key component in enhancing the use of cross-border e-commerce for micro, small and medium-sized enterprises, is access to justice through ODR.[7]

In light of the impasse, we believe that the best way forward would be for Working Group III to shift its focus from drafting rules of procedure to drafting Notes on the Organization of ODR Proceedings, similar to Notes on the Organization of Arbitration Proceedings that will be reviewed at the current session of the Commission. The ODR Notes would be for use by ODR platforms, providers and practitioners. Consistent with the Notes on Organizing Arbitral Proceedings, the Notes for ODR proceedings would not reflect any practice as "the best practice" or seek to resolve the fundamental differences among countries on consumer protection.

Drawing from the Notes for Arbitration Proceedings, the ODR Notes could make clear that they do not impose any legal requirement binding on the ODR administrators, providers, neutrals or the parties. An ODR provider or neutral could refer to the ODR Notes at its discretion and to the extent it sees fit, and need not adopt, nor provide reasons for not adopting, any particular element of the Notes. The Notes would not be suitable for use as ODR Rules since they would not establish any obligation on the platform, provider or the parties to act in a particular way. Thus, the

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[3] Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010), United Nations Doc. A/65/17, para. 255.

[4] See e.g., the UNCITRAL Arbitration Rules (Art. 1(3)); the UNCITRAL Conciliation Rules (Article 1(3)).

[5] See e.g., the Convention on Contracts for the International Sale of Goods (1980) (Art. 2); the United Nations Convention on the Use of Electronic Communications in International Contracts (Art. 2); the Hague Convention on Choice of Court Agreements (2005) (Art. 2); the Hague Principles on Choice of Law in International Contracts (2015) (Art. 1).

[6] Hague Principles on Choice of Law in International Commercial Contracts art. 1(1), March 19 2015, www.hcch.net/upload/conventions/txt40en.pdf (emphasis added).

[7] See Proposal by the Governments of Colombia, Honduras, Kenya and the United States at the last session of the Commission, United Nations Doc. A/CN.9/817 at 2-3.

ODR Notes would be able to avoid the differences in approach concerning consumer law.

We believe that the ODR Notes would be very helpful in promoting the use of ODR and in providing guidance to ODR administrators, providers, and neutrals. The Notes, like the UNCITRAL arbitration notes, could address important matters for ODR such as:

- Use of stages in ODR (e.g. including a preliminary negotiation state where the buyers and sellers negotiate directly through a messaging platform and a facilitated negotiation stage)
- Discretion in the conduct of proceedings and usefulness of timely decisions on organizing proceedings
- Language of the proceedings
- Confidentiality and transparency of information
- Routing of electronic communications (including among the parties and the neutrals)
- Electronic means of sending documents
- Evidence to be considered
- Use of online hearings
- Fees, costs and deposits in respect of costs

We further note that the proposal would be consistent with the original mandate of the Commission. In establishing the Working Group, the Commission did not specify that any specific form of the legal instrument be developed or that the focus be on low value disputes.[8]

For now, we believe that development of ODR Rules may be best left to regional organizations. We also note that the United Nations Conference for Trade and Development (UNCTAD) is negotiating a resolution on consumer protection for the General Assembly that would revise the United Nations Guidelines on the Protection of Consumers and vest oversight over these issues in a body under UNCTAD. The new Guidelines encourage the development of fair, effective and transparent mechanisms to address consumer complaints, including for cross border transactions, through alternate dispute resolution.

[8] Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010), UN Doc. A/65/17, para. 257.

VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the users guide (A/CN.9/SER.C/GUIDE/1/Rev.2), published in 2000 and available on the Internet at www.uncitral.org.

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat
P.O. Box 500
Vienna International Centre
A-1400 Vienna
Austria

Telephone (+43-1) 26060-4060 or 4061
Telefax: (+43-1) 26060-5813
E-mail: *uncitral@un.org*

They may also be accessed through the UNCITRAL homepage on the Internet at https://uncitral.un.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.

IX. TECHNICAL ASSISTANCE TO LAW REFORM

A. Note by the Secretariat on technical cooperation and assistance to law reform

(A/CN.9/837)

[Original: English]

Contents

I. Introduction

1. Pursuant to a decision taken at its twentieth session in 1987, technical cooperation and assistance activities aimed at promoting the use and adoption of its texts represent one of the priorities of the United Nations Commission on International Trade Law (UNCITRAL).[1]

2. In its resolution 67/89 of 14 January 2013, 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 and reiterated its appeal to bodies responsible for development assistance, 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.

3. The General Assembly welcomed the initiatives of the Commission towards expanding, through its Secretariat, its technical cooperation and assistance programme, and noted with interest the comprehensive approach to technical cooperation and assistance, based on the strategic framework for technical assistance suggested by the Secretariat to promote universal adoption of the texts of the Commission and to disseminate information on recently adopted texts.

[1] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

4. The General Assembly also stressed the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions, enacting model laws and encouraging the use of other relevant texts.

5. The status of adoption of UNCITRAL texts is regularly updated and available on the UNCITRAL website. It is also compiled annually in a note by the Secretariat entitled "Status of conventions and model laws" (for the Commission's forty-eighth session, see A/CN.9/843).

6. 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-seventh session in 2014 (A/CN.9/818 of 2 May 2014), and reports on the development of resources to assist technical cooperation and assistance activities.

7. A separate document (A/CN.9/838) provides information on current activities of international organizations related to the harmonization and unification of international trade law and on the role of UNCITRAL in coordinating those activities.

II. Technical cooperation and assistance activities

A. General approaches

8. Technical cooperation and assistance activities undertaken by the Secretariat aim at promoting the adoption and uniform interpretation of UNCITRAL legislative texts. Such activities 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.

9. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; 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 judges and legal practitioners.

10. Design and implementation of technical cooperation and assistance activities took place in line with the priorities identified for such activities, which include: stressing a regional and subregional approach in order not only to achieve economies of scale but also to complement ongoing regional integration initiatives; promoting the universal adoption of those international trade law texts already enjoying wide acceptance, and making particular efforts to disseminate information on recently adopted texts, with a view, if such texts were treaties, to fostering their early adoption and entry into force (A/66/17, para. 255).

11. Some of the key activities undertaken in the relevant time period are described below. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

Initiatives for a regional approach

12. The Secretariat continued participating in the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business (EoDB) project on enforcing contracts in cooperation with the Ministry of Justice of the Republic of Korea. The project aims at strengthening the legislative and institutional framework for the enforcement of contracts in APEC economies and has been expanded to include non-APEC economies as well. During the reporting period, UNCITRAL participated in projects

focusing on Mexico (Mexico City, 26-28 May 2014)*, Myanmar (Naypyidaw, 28-30 August 2014)*, Sri Lanka (Colombo, 27-29 January 2015)* and Thailand (Bangkok, 1-3 April 2015)*. The legal environment for enforcing contracts varied to quite an extent in these four States as well as their adoption of UNCITRAL texts. Recommendations for legal reforms were presented to respective government officials during the fourth and fifth APEC EoDB wrap-up seminars: the fourth for Mexico and Myanmar (Seoul, 25-27 November 2014)* and the fifth for Sri Lanka and Thailand (Seoul, 5-7 May 2015)*. The Secretariat also participated in the conference "World Bank and Ministry of Justice Doing Business 2014 and Beyond: Smart Regulation towards Sustainable Growth", which aimed at expanding the APEC EoDB project to areas other than enforcing contracts and to seek further coordination with the World Bank on its Doing Business indicators (Seoul, 12-15 May 2014)*. The Secretariat's participation in this project was made possible through the continued voluntary contribution from the Government of the Republic of Korea.

13. Additional information on the regional technical assistance and cooperation activities of the UNCITRAL Regional Centre for Asia and the Pacific is available in the dedicated report (A/CN.9/842).

Promotion of the universal adoption of fundamental trade law instruments

14. The Secretariat has continued to engage in promoting the adoption of fundamental trade law instruments, i.e., those treaties that are already enjoying wide adoption and the universal participation to which would therefore seem particularly desirable.

15. The treaties currently considered under that approach are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[2] (the "New York Convention", a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by the Commission), whose universal adoption has already been explicitly called for by the General Assembly,[3] and the CISG.

Promotion of recent treaties

16. The Secretariat continues to promote recently adopted treaties in order to encourage their signature and adoption by States with a view to facilitating their early entry into force and, when already in force, to consolidate their status as globally accepted standards. Treaties currently considered under that approach include the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005),[4] the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules").[5]

17. The Secretariat organized jointly with the Government of Mauritius an event for the opening of the Mauritius Convention on Transparency to signature by States (Port Louis, 17 March 2015).*

18. In promoting the signature and ratification of the Rotterdam Rules, the Secretariat has participated in the Asian Experts Group Meeting to promote ratification in the region, hosted by RCAP and Comité Maritime International in Singapore on 22 April 2015, and has participated as a speaker in the 7th Asian Maritime Law Conference (Singapore, 23-24 April 2015)*.

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[2] United Nations, *Treaty Series*, vol. 330, No. 4739.
[3] United Nations General Assembly, Resolution 62/65 of 8 January 2008, para. 3.
[4] General Assembly resolution 60/21, annex.
[5] General Assembly resolution 63/122, annex.

B. Specific activities

Sale of goods

19. For detailed information on the activities of the Secretariat related to the promotion of the adoption, use and uniform interpretation of UNCITRAL texts on the international sale of goods, see document A/CN.9/849.

Dispute resolution

20. The Secretariat has been engaged in the development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement. The Secretariat has also been engaged in training activities, in the promotion of instruments relating to arbitration and conciliation as well as in supporting ongoing legislative work. Given the high rate of adoption of these texts, the demand for technical assistance in the field of dispute resolution remains particularly acute.

(i) Development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement

21. Regarding the New York Convention, the website (www.newyorkconvention1958.org) which was established in order to make the information gathered in the preparation of the UNCITRAL guide on the New York Convention publicly available,[6] has been expanded with the inclusion of case law from additional jurisdictions, as well as with comprehensive bibliographical references.

22. Regarding the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (the "Model Law on Arbitration"),[7] the Secretariat is currently working on updating the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration.[8]

(ii) Supporting ongoing legislative work and training activities

23. The Secretariat has reviewed or provided comments on legislation on arbitration of Albania, Bahrain, Brazil, British Virgin Islands, Colombia, Colorado (a state of the United States), Georgia, India, Kazakhstan, Mongolia, Montenegro, Myanmar, Palestine, Panama, Qatar, and Turkmenistan.

24. The Secretariat co-organized, with the Austrian Arbitration Association, the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), the International Chamber of Commerce Austria and the Young Austrian Arbitration Practitioners (YAAP), the Vienna Arbitration Day 2015 (Vienna, 13-14 February 2015).

25. Other events on international arbitration in which the Secretariat participated or contributed include:

(a) Alternative Dispute Resolution Workshop, whose purpose was to provide training on arbitration and conciliation legislative frameworks (Kiev, 20-22 May 2014);

(b) Second China-Europe Legal Forum, aimed at enhancing legal exchanges and promoting trade and economic cooperation, organized in cooperation with the European Parliament and the Austrian Parliament (Vienna, 26-27 June 2014);

(c) Expert Group Meetings of the Energy Charter Treaty secretariat to present the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,

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[6] *Official Report of the General Assembly, Sixty-seventh session, Supplement No. 17* (A/67/17), paras. 135 and 136.

[7] United Nations publication, Sales No. E.08.V.4.

[8] Available from www.uncitral.org/uncitral/en/case_law/digests.html.

and the Mauritius Convention on Transparency (Brussels, 4 June 2014 and 21 April 2015), and (ii) the UNCITRAL Rules on Conciliation (Vienna, 13 November 2014);

(d) Conference "International Commercial Arbitration: The UNCITRAL Model Law and Beyond" organized by the Bar Ilan University, (Tel Aviv, 7-10 June 2014);

(e) Conference on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, organized jointly with the Vienna International Arbitration Centre (VIAC) as a side event during the session of the UNCITRAL Working Group II (Arbitration and Conciliation) (Vienna, 16 September 2014);

(f) The 2014 UNCITRAL Hong Kong Seminar in cooperation with the Hong Kong International Arbitration Centre (HKIAC) which dealt with transparency in investor-State dispute settlement (Hong Kong, 15 October 2014)*;

(g) The 2014 UNCITRAL Asia Pacific Fall Conference — Trade Development through the Harmonization of Commercial Law, organized in cooperation with the University of Macau (Macau, 17-18 October 2014)*;

(h) A colloquium on alternative dispute resolution organized in conjunction with L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) for its member States (Abidjan, 17-22 October 2014)* where a presentation was made by the Secretariat on arbitration and mediation legislative frameworks;

(i) A regional round table on arbitration-related topics, organized with the German cooperation organization, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), for its project in the Balkan region; consideration of the Albanian arbitration law (Tirana, 12-14 November 2014);

(j) The 2014 Slovenian Arbitration Conference and the Joint UNCITRAL-Ljubljana Arbitration Centre (LAC) Conference on Dispute Settlement in conjunction with LAC (Ljubljana, 11 November 2014 and 24 March 2015);

(k) Conference on the Role of State Courts in International Commercial Arbitration (Sharm el-Sheikh, Egypt, 15-18 November 2014);

(l) Third Asia-Pacific Alternative Dispute Resolution Conference organized by the UNCITRAL Regional Centre for Asia and the Pacific jointly with the Ministry of Justice of the Republic of Korea and the Korean Commercial Arbitration Board (Seoul, 15-19 November 2014)*;

(m) Training on arbitration-related issues to representatives of the Government of Kazakhstan (Vienna, 17-20 November 2014);

(n) Conference organized by the Kiel Centre for Eurasian Economic Law (KEEL) on "Settlement of International Trade Disputes in the Region of the Caucasus and Central Asia: Public and Private Mechanisms" (Kiel, Germany, 28-29 November 2014);

(o) Workshop on arbitration jointly organized with the Economic Cooperation Organization (ECO) for ECO member States (Tehran, 2 December 2014)*;

(p) Round table organized by the Brussels Office of the Trans-Atlantic Business Council (TABC) to deliver a presentation on UNCITRAL perspectives on investor-State dispute settlement (Brussels, 4 December 2014);

(q) Annual Conference organized by the Investment Security in the Mediterranean (ISMED) Initiative, "Defining a Way Forward for Infrastructure Investment in the Middle-East and North Africa (MENA)" (Paris, 4-5 December 2014)*;

(r) International Conference for Euro-Mediterranean Community of International Arbitration (Marseilles, France, 8-9 December 2014)*;

(s) Mauritius International Arbitration Conference 2014 (MIAC) (Flic-en-Flac, Mauritius, 15-16 December 2014);

(t) Meetings with the Arbitration Court at the Chamber of Economy of Montenegro (Podgorica, 30 December 2014);

(u) Asia Pacific Mediation Summit on building sustainable mediation programmes and commercial and cross-border mediation (New Delhi, 12-15 February 2015)*;

(v) Meeting with Permanent Secretary of OHADA (Vienna, 19-20 February 2015);

(w) Third International Conference of ICC Palestine with respect to the new Palestinian Arbitration Law and training with regard to the New York Convention (Ramallah, 26-28 February 2015)*;

(x) Arbitration round table organized by the Commercial Law Development Program (CLDP), ICC-Paris, the Bahrain Chamber for Dispute Resolution (BCDR-AAA) and the Judicial Council of Amman (Amman, 5-7 March 2015)*;

(y) Conference on UNCITRAL's work on transparency with regards to the investments in the Mena region (Besancon, France, 13 March 2015)*;

(z) International conference on investor-State arbitration and arbitration in general which preceded the signing ceremony of the Mauritius Convention on Transparency (Port Louis, 17 March 2015)*;

(aa) International Arbitration Conference at Comenius University to discuss amendments to Slovakia's Arbitration Act (Bratislava, 23 April 2015); and

(bb) A presentation to Members of the European Parliament on "ISDS transparency in practice" at a seminar on "ISDS in the TTIP" organized by the Stockholm Chamber of Commerce (Brussels, 5 May 2015).

Electronic commerce

26. The Secretariat has continued promoting the adoption of UNCITRAL texts on electronic commerce, including in cooperation with other organizations and emphasizing a regional approach. In that framework, the Secretariat has provided comments on draft regional and national legislation and engaged in informal consultation with legislators and policymakers from various jurisdictions.

27. Activities relating to promoting the adoption of UNCITRAL texts on electronic commerce and their effective use and uniform interpretation where already adopted include:

(a) Delivering a presentation on the possible contribution of UNCITRAL texts, in particular the Electronic Communications Convention, in promoting cross-border recognition of electronic signatures between European Union member States and non-European Union member States at the 14th European Forum on Electronic Signature (EFPE 2014) (Miedzyzdroje, Poland, 4-6 June 2014)*;

(b) Delivering presentations at an event for Malagasy commercial operators and practitioners and at a judiciary training workshop. The participation of one expert from the region was also funded (Antananarivo, 8-10 July 2014)*. In 2014, Madagascar has adopted laws on e-commerce and e-signature based on UNCITRAL texts;[9]

(c) Delivering presentations at a workshop on the new law of San Marino on electronic transactions. (San Marino, 22 December 2014), adopted in 2013 and based on UNCITRAL texts.[10] The participation of two experts from the region was also funded;

[9] See press release UNIS/L/212, "Madagascar Adopts Electronic Transactions and Electronic Signature Law Based on UNCITRAL Texts", 16 January 2015.

[10] See press release UNIS/L/184, "San Marino Adopts Electronic Commerce Law Based on UNCITRAL Texts", 24 May 2013.

(d) Delivering presentations at the UNCTAD — ECOWAS Seminar on Cyberlaw Harmonisation and at the UNCTAD Expert Meeting on Cyberlaws and Regulations for Enhancing E-Commerce: including Case Studies and Lessons Learned (Geneva, 23-27 March 2015).

28. Additional relevant events are listed in the note prepared by the UNCITRAL Regional Centre for Asia and the Pacific on its activities (see A/CN.9/842).

Procurement

29. In accordance with requests of the Commission and Working Group I (under its former mandate on Public Procurement and Infrastructure Development), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the UNCITRAL Model Law on Public Procurement (2011) (the "Model Law"),[11] its accompanying Guide to Enactment (2012),[12] and the UNCITRAL texts on Privately-Financed Infrastructure Projects.[13]

30. The aims of such cooperation are to ensure that reforming Governments and organizations are informed of the terms of and the policy considerations underlying those texts, including as regards regional requirements and circumstances, so as to promote a thorough understanding and appropriate use of the Model Law.[14] The Secretariat is following a regional approach to this cooperation through activities with the multilateral development banks and other organizations, addressing the role of public procurement in sustainable development, good governance, the avoidance of corruption and achieving value for money in government expenditure.

31. The main such activities and international events in the year to June 2015, in which the Secretariat has participated as speaker/presenter, included:

(a) Participation as a speaker on the legislative framework for Public-Private Partnerships (PPPs) and modern trends in that field, at the first Songdo Asia-Pacific Conference on PPPs co-organized by Korean Legislation Research Institute and the Korean International Trade Law Association and UNCITRAL RCAP (Incheon, Republic of Korea, 9-10 June 2014);

(b) Participation as a member of the Working Party of the OECD's Leading Practitioners on Public Procurement, in a session of the Public Integrity Network, in a joint seminar on Whistle-blower Protection, and on implementation of the 2015 OECD Recommendation on Public Procurement (Paris, 17-18 June 2014 and 27-28 April 2015 (virtual participation));

(c) Participation as a speaker at a regional conference "Procurement Week 2015", organized by the Institute for Competition and Procurement Studies and the Welsh Government (Cardiff, 17-20 March 2015);

(d) Participation in the Center for Global Development Working Group on Contract Publication, and contributions to "Publishing Government Contracts: Addressing Concerns and Easing Implementation"[15] (Washington, D.C., 8-9 September 2014);

(e) Presentation at a Regional Seminar on fraud and corruption in public procurement at the International Anti-Corruption Academy, (Vienna, 18 September 2014);

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[11] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[12] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

[13] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on Privately-Financed Infrastructure Projects, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[14] See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186-189.

[15] www.cgdev.org/publication/publishing-government-contracts-addressing-concerns-and-easing-implementation.

(f) Participation as a speaker in the European University Institute Global Governance Programme Conference on "The Internationalization of Government Procurement Regulation", to discuss the impacts of international cooperation in UNCITRAL, the WTO and regarding preferential trade agreements (Florence, Italy, 15-16 December 2014);

(g) Within the framework of an EBRD UNCITRAL Public Procurement Initiative, with the support of the OSCE: (i) Presentation of the Model Law and supporting Guide to Enactment on complaints mechanisms and related topics at a regional seminar on Safeguards for Effective Review of Complaints in Public Procurement: Legislation and Practice (Vienna, 28-29 May 2015); (ii) Regional Seminar on public procurement reforms sessions for the Kyrgyz Republic and Tajikistan (Vienna, 22-23 September 2014); (iii) Attendance at six-monthly review meetings of the progress on the Initiative and activities in cooperation with other development partners, such as OECD, OECD-SIGMA, ADB, IsDB, EIB, and others (London, 2 September 2014 (virtual meeting) and 12 January 2015); and (iv) Rounds of consultations with drafters of primary and secondary public procurement legislation and supporting donors in the Kyrgyz Republic and Tajikistan (throughout the year);

(h) Participation in World Bank's International Advisory Group on Procurement, to review and comment on the proposed new Framework for procurement, held at the World Bank Country Office in Egypt (Cairo, 17-18 February 2015);

(i) Contributions to the World Bank's "Benchmarking Public Procurement" report, and participation in a joint World Bank Group — George Washington University Law School panel on the topic (Washington, D.C., 12 March 2015 (virtual participation));

(j) Presentation of UNCITRAL's legislative texts on Privately-Financed Infrastructure Projects and possible future work on PPPs to IADB staff (Washington, D.C., April 9, 2015 (virtual presentation));

(k) Participation in the OECD Task Force on Procurement, co-chaired by the World Bank and the AfDB, to consider revisions to the OECD-DAC methodology for the assessment of public procurement systems, and the establishment of a global community of practice for public procurement (Manila, 20-21 April 2015 (virtual participation).

Supporting ongoing legislative work and training activities

32. The Secretariat has provided advice to the Governments of the Dominican Republic, Jamaica, Surinam and Trinidad and Tobago (with the support of the IADB) and to Kazakhstan, the Kyrgyz Republic and Tajikistan (within the framework of the EBRD UNCITRAL Public Procurement Initiative) on reform of their public procurement legal and regulatory framework.

33. The Secretariat has participated as a lecturer in (i) the programme of an Executive LLM in Public Procurement Law and Policy (University of Nottingham, United Kingdom, 10-11 January 2015; (ii) the 8th and 9th editions of the ITC-ILO Master in Public Procurement for Sustainable Development (Turin, Italy, 17-18 and 30 June 2014 and 2-3 March 2015); and (iii) the International Master in Public Procurement Management (PPM) course at the University of Rome, and in conjunction with the EBRD, Department of Business Government Philosophy Studies (Rome, 16-17 April 2015).

34. Further activities in this field are listed in the note prepared by the UNCITRAL Regional Centre for Asia and the Pacific on its activities (see A/CN.9/842).

Insolvency

35. The Secretariat has promoted the use and adoption of insolvency texts, particularly the UNCITRAL Model Law on Cross-Border Insolvency (1997)[16] and the UNCITRAL Legislative Guide on Insolvency Law (2004),[17] through participation as a speaker at various international meetings and conferences, including:

(a) The European Insolvency and Restructuring Conference on International Insolvency Law Harmonization (Brussels, 23 May 2014), addressing the UNCITRAL process of harmonization and modernization as it relates to insolvency law in a panel on Reforming European National Insolvency Laws: A View from the Executive;

(b) The annual Conference of the International Exchange of Experience on Insolvency Law network (Barcelona, Spain, 28-30 May 2014) to present a lecture on the UNCITRAL process of harmonization and modernization as it relates to insolvency law, focusing on cross-border insolvency;

(c) Meetings with the Law Council of Australia and the Australian Attorney-General's Department (Canberra) concerning Australia's participation at UNCITRAL and seminars on the work of UNCITRAL, focussing on insolvency (Sydney, Canberra and Melbourne, Australia, 24-26 June 2014)*;

(d) Regional Conference of the Arab Center for the Development of the Rule of Law and Integrity (ACRLI) — "Middle East Bankruptcy Reform Initiative project" (Amman, 14-15 September 2014) to discuss international best practice based on the UNCITRAL Legislative Guide on Insolvency Law;

(e) Africa Round Table on Insolvency Reform (ART) (Kampala, 15-18 October 2014).* The Round Table was established with the aim of facilitating discussion of insolvency law reform in Africa and identifying outcomes for further action. This event attracts participation at a high level and includes judges, government officials from both insolvency, company supervisory and other relevant ministries, insolvency professionals, bankers, and international organizations. Significant reform in some countries of the region has provided an impetus to others, as they compare themselves to best practice and international standards. As a result, we are seeing increasing enactment of the Model Law on Cross-Border Insolvency;

(f) Seminar for the American College of Bankruptcy at Boston College on the history of the UNCITRAL Model Law on Cross-Border Insolvency (Boston, United States of America, 20 March 2015);

(g) The 11th Joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium, which aims to share information on and promotion of greater understanding of, cross-border insolvency cooperation and the key facilitating role of the Model Law on Cross-Border Insolvency. The participation of three judges from Uganda, Kenya and Romania was also funded (San Francisco, United States, 21-22 March 2015)*; and

(h) Insolvency law in Europe: current trends and future perspectives, organized by the Latvian Presidency of the EU, Latvian Ministry of Justice and the EC (Jurmala, Latvia, 23-24 April 2015).

36. The Secretariat liaised with the Philippines concerning enactment of the Model Law on Cross-Border Insolvency to clarify certain aspects of the legislation and reviewed the enactments of the Model Law by Chile, Seychelles and Vanuatu.

Security interests

37. The approach taken by the Secretariat in providing technical assistance related to UNCITRAL texts on security interests (the United Nations Convention on the Assignment of Receivables in International Trade (2001), the UNCITRAL Legislative Guide on Secured Transactions (2007), its Supplement on Security Rights

[16] General Assembly resolution 52/158, annex.
[17] United Nations publication, Sales No. E.05.V.10.

in Intellectual Property and the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)) is twofold. The first approach focuses on disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus, promoting their implementation. Such activities included the following:

(a) Participated in a panel session and delivered a presentation at the "Capacity-Building Seminar on Secured Transactions Reform" organized by the Organization of American States (OAS) (San Salvador, 21-23 May 2014)*;

(b) Participated in the 14th Annual Conference of the International Insolvency Institute (III) and in the conference on secured financing and registries with the Mexican Ministry of Economy, General Direction of Business Regulation (Mexico City, 8-11 June 2014)*;

(c) Delivered a presentation at the Conference on "Current Developments in International and Comparative Insolvency Law: Corporates, Financial Institutions and Sovereigns" organized by European University Institute (Florence, Italy, 23-25 July 2014);

(d) Delivered a presentation at the International Symposium on "Intellectual Property and Venture Capital: the Secrets to Building Innovation Ecosystems" organized by Kyushu University School of Law and Hokkaido University School of Law and at a seminar held by the Institute of Foreign and Investment Studies of the Bank of Japan; meetings with the Ministry of Justice and Finance (Tokyo, 2-9 September 2014);

(e) Participated at a seminar organized by the Centre for Banking and Financial Law, the Federal Ministry of Justice of Switzerland and the University of Geneva on the draft UNCITRAL Model Law on Secured Transactions (Geneva, 19 September 2014);

(f) Conducted: (i) briefings of officials of the Istanbul Chamber of Commerce-Istanbul Ticaret Odasi (ITO) and the Central Securities Depository-Merkezi Kayit Kuruluşu (MKK); (ii) a seminar on security interests registries based on the UNCITRAL Guide on the Implementation of a Security Rights Registry; and (iii) a seminar on security interests in bank accounts and non-intermediated securities, and security interests in insolvency based on the UNCITRAL Legislative Guide on Secured Transactions and the draft Model Law on Secured Transactions (Istanbul, 28 October-1 November 2014);

(g) Participated at the Commercial Finance Association (CFA) 70th Annual Convention and presentation of work of UNCITRAL in the area of security interests (Washington, D.C., 12-14 November 2014);

(h) Participated in a seminar on secured transactions organized by the Vienna University of Economics and Business (Vienna, 23 February 2015); and

(i) Delivered a presentation at a conference on secured transactions in the work of UNCITRAL organized by the European Law Institute (ELI) in cooperation with the Austrian Bank Association and the University of Vienna Law School (Vienna, 6 March 2015).

Supporting ongoing legislative work and training activities

38. Staff members of the Secretariat participated as lecturers on secured financing based on the UNCITRAL texts in: (a) the ITC-ILO course on International Trade Law (Turin, Italy, 24-25 February 2015); (b) a course organized by the Civil Law Institute of the University of Vienna Law School (Vienna, fall 2014); and (c) a course jointly organized by the Civil Law Institute of the University of Vienna Law School and the European and Asian Legal Studies programme of the University of Vienna and the City University of Hong Kong (Vienna, spring 2015).

39. The second approach focuses on providing technical assistance to States in their secured transactions law reform activities. An example of such activities is the

technical assistance provided in cooperation with the World Bank Group to the Government of Trinidad and Tobago with respect to efforts to reform their secured transactions law. Another example is the capacity-building/technical assistance provided to the Government of Jamaica in cooperation with the Organization of American States. The objective of this cooperation is to ensure that technical assistance is provided consistent with UNCITRAL texts and in particular the UNCITRAL Legislative Guide on Secured Transactions.

40. The Secretariat also engages in informal consultation with legislators and policymakers from various jurisdictions, in some instances as a follow-up to the aforementioned activities. Finally, the Secretariat is making progress in its work with the World Bank with a view to revising the World Bank Insolvency and Creditor Rights Standard to include the key recommendations of the UNCITRAL Legislative Guide on Secured Transactions and reference to the other texts of UNCITRAL on security interests.

Micro, Small and Medium-sized Enterprises

41. The Secretariat has encouraged participation in and dialogue in respect of its work on micro, small and medium-sized enterprises (MSMEs — Working Group I) through its participation, in the Corporate Registers Forum (CRF) annual conference, "Corporate Registration as a Driving Force for Entrepreneurship" (Abu Dhabi, 9-12 March 2015)*.

III. Dissemination of information

42. 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.

A. Website

43. The UNCITRAL 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, events and news. In line with the organizational policy for document distribution, official documents are provided, when available, via linking to the United Nations Official Document System (ODS).

44. In 2014, the website received roughly 640,000 unique visitors, an increase from 2013 (575,000 unique visitors). Of all sessions, roughly 58 per cent were directed to pages in English and 42 per cent to pages in Arabic, Chinese, French, Russian and Spanish. In this respect, it should be noted that, while the UNCITRAL website is among the most important electronic sources of information on international trade law in all languages, it may represent one of few available sources on this topic in some of the official languages.

45. The content of the website is updated and expanded on an ongoing basis in the framework of the activities of the UNCITRAL Law Library and therefore at no additional cost to the Secretariat. The General Assembly has welcomed "the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines."[18] In this regard, a Tumblr microblog has been established ("What's new at UNCITRAL?") that is accessible from the UNCITRAL website. Another update is the establishment of interactive status maps for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),[19] the UNCITRAL

[18] General Assembly resolution 69/115.

[19] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention_status_map.html.

Model Law on International Commercial Arbitration (1985),[20] and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[21]

B. Library

46. 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, global staff of the United Nations, staff of other Vienna-based international organizations, external researchers and law students. In 2014, library staff responded to approximately 650 reference requests, a 19 per cent increase over 2013, originating from over 43 countries.

47. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 10,000 monographs, 100 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, 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. While use of electronic resources has increased, resources on trade law from many countries are still only found in print, and circulation of print items has remained steady (a roughly 8 per cent increase in 2014 over 2013).

48. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna. The OPAC is available via the library page of the UNCITRAL website.[22] In 2015, the OPAC will be updated, providing an easier to use and enhanced interface.

49. The UNCITRAL Law Library staff prepares for the Commission an annual "Bibliography of recent 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 (for the forty-eighth Commission session, see A/CN.9/839). 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 available in the bibliography section of the UNCITRAL website.

50. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.[23] The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 7,500 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible.

C. Publications

51. In addition to official documents, UNCITRAL traditionally maintains two series of publications, namely the texts of all instruments developed by the Commission and the UNCITRAL Yearbook. Publications are regularly provided in support of 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.

52. The following works were published in 2014: Guide to Enactment of the UNCITRAL Model Law on Public Procurement,[24] UNCITRAL Arbitration Rules

[20] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration/1985Model_arbitration_status_map.html.
[21] Available from www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status_map.html.
[22] Available from www.uncitral.org/uncitral/publications/library.html.
[23] Available from www.uncitral.org/uncitral/publications/bibliography_consolidated.html.
[24] Available from www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

(with new article 1, paragraph 4, as adopted in 2013),[25] UNCITRAL Guide on the Implementation of a Security Rights Registry, UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2013),[26] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation,[27] UNCITRAL Model Law on Public Procurement,[28] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,[29] and the 2011 UNCITRAL *Yearbook*.[30]

53. The following work was published in early 2015: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).[31]

54. In light of budget and environmental concerns, the Secretariat has continued its efforts to use electronic media as a primary method to disseminate UNCITRAL texts. Thus, print runs for all publications have been reduced and several texts published in 2014 have been published exclusively in electronic format, namely: Guide to Enactment of the UNCITRAL Model Law on Public Procurement (e-book), UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2013) (e-book), and the 2011 UNCITRAL *Yearbook* (CD-ROM and e-book).

D. Press releases

55. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of an UNCITRAL model law or other relevant text. Press releases are also issued with respect to information of particular importance and direct relevance to UNCITRAL. 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 or of the Department of Public Information, News and Media Division in New York, if applicable.

56. To improve the accuracy and timeliness of information received with respect to the adoption of UNCITRAL model laws, since such adoption does not require a formal action with the United Nations Secretariat, and to facilitate the dissemination of related information, the Commission may wish to request Member States to advise the Secretariat when enacting legislation implementing an UNCITRAL model law.

E. General enquiries

57. The Secretariat currently addresses approximately 2,000 general enquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these enquiries are answered by reference to the UNCITRAL website.

F. Briefings for Permanent Missions in Vienna

58. The UNCITRAL Secretariat held briefings for Permanent Missions of States in preparation for the forty-eighth session of UNCITRAL.

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[25] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration.html.
[26] Available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html.
[27] Ibid.
[28] Available from www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.
[29] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration.html.
[30] Available from www.uncitral.org/uncitral/publications/yearbook.html.
[31] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration.html.

G. Information lectures in Vienna

59. The Secretariat provides upon request information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar, Government officials including judges and others interested. Since the last report, lectures have been given to visitors from, inter alia, Austria, China, France, Germany, Greece, Hungary, Latin America, Moscow, Mozambique, Turkey and visiting delegations from Brazilian Vis Moot, Cicero League of International Lawyers, European Law Students' Association (ELSA), Moot Alumni Association, Kazakhstan, Mozambique and Saudi Arabia.

IV. Resources and funding

60. The costs of most technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extrabudgetary funding.

61. The Secretariat has explored a variety of ways to increase resources for technical assistance activities, including through in-kind contributions. In particular, a number of missions have been funded, in full or in part, by the organizers. Additional potential sources of funding could be available if trade law reform activities could be mainstreamed more regularly in broader international development assistance programmes. In this respect, the Commission may wish to provide guidance on possible future steps.

A. UNCITRAL Trust Fund for symposia

62. 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.

63. During the period under review, a new contribution of Euro 15,000 (earmarked for activities related to Euro-Mediterranean Community of International Arbitration) was received from the Government of France as well as a contribution of US$ 20,000 by the Government of Indonesia. The Government of the Republic of Korea, through its Ministry of Justice provided a contribution of US$ 17,336.90 for the participation of the UNCITRAL Secretariat in the APEC EoDB project.

64. At its 47th Session (New York, 7-18 July 2014), the Commission appealed to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL symposia, if possible, in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance (A/69/17, paras. 167-168). Potential donors have also been approached on an individual basis.

65. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds available in the Trust Fund are sufficient only for a very small number of future technical cooperation and assistance activities. Efforts to organize the requested activities at the lowest cost and with co-funding and cost sharing whenever possible are ongoing. However, once current funds are exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other costs will have to be declined unless new donations to the Trust Fund are received or alternative sources of funds can be found.

66. 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 in identifying sources of funding within their Governments.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

67. 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.

68. In the period under review, a contribution in the amount of euro 5,000 was received from the Government of Austria, as well as another contribution, in the amount of US$ 3,000 by the Commercial Finance Association (CFA), both to whom the Commission may wish to express its appreciation.

69. During the same reporting period, the available Trust Fund resources were used to facilitate participation at the 47th session of UNCITRAL in New York in July 2014 for delegates from Kenya, Honduras and El Salvador, as well as for a delegate of Mexico to participate in the 25th session of WG VI in New York, a delegate of El Salvador in the 23rd session of WG I in Vienna and a delegate of Colombia in the 24th session of WG I in New York. In order to allow for broader assistance despite the limited resources of the fund, cost coverage in each case has been provided either for the air ticket, or for the DSA only.

70. 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.

71. 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.

B. Note by the Secretariat on technical assistance to law reform

(A/CN.9/845)

[Original: English]

Contents

I. Introduction

At its forty-third session, in 2010, the Commission 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 the United Nations Development Programme or other country offices of the United Nations.[1] The present note is submitted pursuant to that request. It contains a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms. The Secretariat suggests that the Commission should finalize, approve and transmit the guidance note to the General Assembly for endorsement with the request to the Secretary-General to circulate it across the United Nations system.

II. Draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

"Guidance note on strengthening United Nations support to States to implement sound commercial law reforms

A. About this Guidance Note

1. This Guidance Note provides the guiding principles and framework for strengthening United Nations support to States, upon their request, to implement sound commercial law reforms on the basis of internationally accepted standards. It is framed within the United Nations mandate to promote higher standards of living, full employment, and conditions of economic and social progress and development, as well as solutions of international economic, social and related problems.[2] It is a contribution to the implementation of the international development agenda and General Assembly resolutions calling for: (a) enhanced technical assistance and capacity-building in the commercial law field; (b) better integration of the work in that field in the broader agenda of the United Nations; (c) greater coordination and coherence among the United Nations entities and with donors and recipients; (d) greater evaluation of the effectiveness of such activities; (e) measures to improve the effectiveness of capacity-building activities; and (f) placement of national perspectives at the centre of United Nations assistance programmes.

2. This Guidance Note is relevant to all United Nations departments, offices, funds, agencies and programmes as well as other donors that deal with: (a) mobilizing finance for sustainable development; (b) reducing or removing legal obstacles to the

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 336.

[2] The Charter of the United Nations, article 55 (a) and (b).

flow of international trade and achieving international and/or regional economic integration; (c) private sector development; (d) justice sector reforms; (e) increasing resilience of economy to economic crisis; (f) good governance, including public procurement reforms and e-governance; (g) empowerment of the poor; (h) preventing and combatting through education economic crimes (e.g. commercial fraud, forgery and falsification); (i) addressing root causes of conflicts triggered by economic factors; (j) addressing post-conflict economic recovery problems; (k) addressing specific problems with access to international trade by landlocked countries; and (l) domestic implementation of international obligations in the area of international commercial law and areas related thereto.

B. Guiding Principles

1. The United Nations work in the field of international commercial law should be an integral part of the broader agenda of the United Nations

1. The establishment of sound rules furthering commercial relations is an important factor in economic development. This is because commercial decisions are taken not in isolation but in the context of all relevant factors, including the applicable legal framework.

2. The modern and harmonized international commercial law framework is the basis for rule-based commercial relations and an indispensable part of international trade. In reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, it also contributes 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. The implementation and effective use of such framework are also essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. They can thus produce the positive multifaceted impact on all three pillars upon which the United Nations is built: peace and security, human rights and development.

3. For these reasons, the United Nations work in the field of international commercial law should be better integrated at the headquarters and country levels in United Nations operations, be they in development, conflict-prevention, post-conflict-reconstruction or other context.

2. The need for assistance with domestic commercial law reforms should be regularly assessed

1. The adequate local capacity to enact, enforce, implement, apply and interpret the sound commercial law framework should be in place for the expected benefits of rule-based commercial relations and international trade to accrue. Often States need international assistance with building the required local capacity to enact necessary rules and adequately enforce, implement, apply and interpret them. The United Nations system should be equipped to provide necessary assistance when requested to do so.

2. The legal framework should provide for the recognition, protection and enforcement of property rights and legal relationships. It should also provide for legal certainty and predictability in order to enable parties to commercial transactions to take commercially reasonable decisions. It should also be readily available, easily understood and allow for its uniform interpretation and application. Harmonization of the local legal framework regulating commercial relations with internationally accepted commercial law standards should be promoted in this context since such harmonization facilitates fulfilling these basic requirements in the local legal framework.

3. Legal certainty, credibility and predictability depend not only on the stability and quality of the applicable law but also on the ways legal relationships

(e.g. contracts) are respected and enforced. There should be swift and effective mechanisms to hold those violating the legal framework accountable. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment must operate on the basis of internationally recognized human rights and should be easily accessible, affordable, efficient and effective. Arbitration and alternative dispute resolution mechanisms (jointly referred to in this Guidance Note as ADR) should also be available as an option to seek adjudication of commercial disputes in a neutral forum, and the court system should aim to be equipped with means to efficiently and effectively support ADR.

3. Commercial law reforms should be holistic and coordinated as appropriate with other relevant initiatives

1. Laws and regulations governing commercial relations and the accompanying institutional framework are not purely technical matters. They embody particular policy preferences. They can produce political and social impact, in addition to the obvious, economic impact. Ill-conceived policies, rules, procedures and practices applicable to commercial relations may trigger short- and long-term negative consequences.

2. Commercial law reforms should therefore involve close consultations and coordination among all relevant stakeholders. In particular, the close link between policymaking and law-making and institutional reforms needs to be ensured. The results of coordination and cooperation achieved at the country level must be preserved at the headquarters level and vice versa.

4. Local capacity to effectively implement sound commercial law reforms should be continuously built

1. Commercial law constantly evolves in response to new business practices and global challenges. This necessitates building local capacity to engage in relevant commercial law reforms that keep pace with international developments in finance and commerce. There should be sufficient local expertise capable of drawing on readily available international standards, tools and expertise for carrying out commercial law reforms at the country level. There should also be sufficient local expertise capable of coordinating the position of a State in regional and international rule-formulating bodies in order to avoid conflicting rules and interpretations appearing in those bodies.

2. Good laws regulating commerce may be enacted at the local level but their economic impact may be limited when there is no local capacity to properly implement and enforce them. Commercial law reform is therefore a continuous process that does not end with the enactment of the law. It presupposes a number of supplementing measures, such as developing the required capacity to operate and administer the applicable legal framework, monitor its implementation and impact and react promptly and appropriately to any shortcomings.

3. Positive results achieved at the legislative and implementation stages can also be undermined through conflicting interpretations of laws and conflicting enforcement results. Achieving transparent, consistent and predictable outcomes in jurisprudence on commercial law matters in compliance with the relevant international obligations of States[3] is important for rule-based commercial relations. Judges, arbitrators, law professors and other legal practitioners play the primary roles in this regard. Their capacity to interpret international commercial law standards promoting uniformity in their application and the observance of good faith in international trade should be a continuous concern.

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[3] E.g. the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), article 7. United Nations, *Treaty Series*, vol. 1489, No. 25567. Also available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (accessed May 2013).

5. UNCITRAL is the core legal body in the United Nations system in the field of international commercial law and as such should be relied upon in strengthening United Nations support to States to implement sound commercial law reforms

1. UNCITRAL is the only global and neutral international law-making body entrusted with legislating on commercial law matters on behalf of the entire international community. Not only States and relevant intergovernmental organizations but also professional associations and other non-governmental organizations participate in the UNCITRAL legislative process. This contributes to the transparency and inclusiveness of the standard-making process and ensures scrutiny of legislative proposals by representatives of various economic and social interests, different legal traditions and societies at different levels of development. The possible disconnect between Government delegates and business world representatives is therefore minimized and adopted texts ideally reflect the optimal balance between the many competing interests. These facts together with consensus building ensure a type of legislative due process that gives legitimacy to UNCITRAL standards as internationally accepted ones, rather than the product of any given system or country.

2. UNCITRAL standards represent what the international community considers at a given time to be the best international practices for regulating certain commercial transactions. They equip States with models and guidance to support sound commercial law reforms at lower costs. Reliance on such standards enhances the quality of enacted legislation in the long run and builds confidence of the private sector, including foreign investors, in ease of doing business in a country that adheres to them. Most standards are adaptable to local circumstances and needs of commercial parties.[4]

3. In addition to internationally accepted commercial law standards, UNCITRAL provides such readily-available technical assistance, capacity-building and other tools as CLOUT,[5] digests of case law,[6] databases related to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958[7] (the New York Convention),[8] and other databases and publications,[9] that aim to facilitate the understanding and use of those standards and to disseminate information about modern legal developments, including case law, in the international commercial law field. Those tools are in particular indispensable in training judges, arbitrators, law professors and other legal practitioners on commercial law matters and to the legal empowerment of people in general.

4. The areas covered by UNCITRAL work are: (a) contracts (international sale of goods, international transport of goods, electronic commerce); (b) international commercial and investment dispute settlement (arbitration, conciliation, online dispute resolution (ODR) and transparency in investor-State dispute resolution); (c) public procurement and privately financed infrastructure projects; (d) international

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[4] For the up-to-date list of the UNCITRAL standards, see www.uncitral.org/uncitral/en/uncitral_texts.html.

[5] www.uncitral.org/uncitral/en/case_law.html.

[6] www.uncitral.org/uncitral/en/case_law/digests.html.

[7] United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed May 2013).

[8] www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[9] E.g. the recurrent publication on the judicial perspective on cross-border insolvency cases (www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html), the Practice Guide on Cross-Border Insolvency Cooperation (www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html), and Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods (www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf).

payments; (e) insolvency law; (f) security interests; (g) commercial fraud; and (h) enabling legal environment for micro-, small- and medium-sized enterprises.[10]

C. Operational framework

1. The need to identify local requirements for commercial law reforms should be recognized in United Nations operations in the appropriate context, such as in peacebuilding and development assistance frameworks. To effectively address any identified local requirements for commercial law reforms, awareness about United Nations existing standards, tools and expertise related to regulation of commercial relations and recourse to them should be substantially increased across the United Nations system. An annex to this Guidance Note may serve as a checklist of indicators relevant in the assessment of the state of commercial law framework in a particular country.

1. Legal framework

2. States may request technical assistance and capacity-building with their commercial law reform efforts, in particular with identification of local needs for commercial law reforms or with enactment of a law on a particular commercial law subject. In response, the United Nations should endeavour to assist States with:

(a) Providing the basis and protection for rule-based commercial relations in the domestic legal framework (for guidance see the commentary to guiding principle 2 above);

(b) Assessing the general commercial law framework and the status of its implementation in the State, e.g.: (i) is the State party to fundamental conventions in the commercial law field (e.g. the New York Convention), which will be conducive to other commercial law reforms?; (ii) if yes, what is the status of their implementation?; (iii) if not, which measures are taken to consider becoming such? and (iv) is the local commercial law framework otherwise compliant with internationally accepted commercial law standards?

(c) In the context of a particular commercial law reform:

(i) Identifying an applicable internationally accepted commercial law standard and related readily-available tools and expertise designed to facilitate its enactment;

(ii) Identifying all stakeholders relevant to the commercial law reform, including domestic reform constituencies, international experts, various rule-of-law-assistance providers working in the same or related field, etc., and ensuring proper consultations and if necessary strategic partnerships with them;

(iii) Preparing a comprehensive legislative package to accompany the adoption of a new law (e.g. other necessary laws, regulations, guidance and/or codes of conduct) and ensuring the proper expert assessment of the legislative package before the law is adopted.

2. State institutions involved in commercial law reforms

States may request technical assistance and capacity-building, in particular as regards:

(a) Development of capacity in various State institutions (parliamentary committees, ministries of justice, trade and economic development, public procurement agencies, monitoring and oversight bodies) to handle commercial law reforms and implement commercial law framework. Technical assistance and capacity-building in such cases may take the form of: (i) raising awareness of readily available internationally accepted commercial law standards, and tools and expertise

[10] New areas of work may be added. For the most updated list, please contact the UNCITRAL secretariat at the addresses indicated in the end of this Guidance Note or check the UNCITRAL website (www.uncitral.org).

designed to facilitate understanding, enactment and implementation of those standards; (ii) circulating texts of the relevant internationally accepted commercial law standards; (iii) organizing briefings or training; (iv) supporting efforts to centralize local expertise on commercial law issues, for example through the establishment of a national centre of commercial law expertise or national research centre and national databases on commercial law issues; and (v) facilitating responsible and continuous representation of local experts in international and regional commercial law standard-setting activities;

(b) Building capacity of local judges, arbitrators and other legal practitioners to better understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgments and awards. Means of assistance may include: (i) raising awareness of readily available international tools designed to facilitate understanding and uniform interpretation and application of internationally accepted commercial law standards; (ii) supporting the establishment of a mechanism for collecting, analysing and monitoring national case law related to internationally accepted commercial law standards[11] and collecting relevant statistics, e.g. on the speed of adjudication and enforcement; (iii) supporting continuous learning courses for judges and including in the curricula of such courses the relevant readily available international tools referred to above; (iv) organizing local judicial training with the participation of experts; and (v) raising awareness about international judicial colloquia and facilitating participation of local judges in them;

(c) The establishment and functioning of arbitration and conciliation centres. Means of assistance may include: (i) attracting readily available expertise for the establishment of, and support to, such centres; (ii) facilitating access to ADR and ODR mechanisms available in those centres, for example by raising public awareness about them; (iii) organizing training for separate groups of ADR practitioners with the involvement of relevant experts to assist these mechanisms to become more responsive to the rights and needs of intended end-users (e.g. arbitrators on uniform application and interpretation of international commercial standards; mediators and conciliators on conflict resolution skills; and ODR providers on issues specific to e-environment); and (iv) addressing through court reforms and other measures the role of the judiciary in providing appropriate support to ADR and ODR mechanisms.

3. Private sector, academia and general public

Measures towards raising public awareness of commercial law matters, mobilizing and supporting grass-roots initiatives that are able to monitor effectiveness of the commercial law framework and initiate necessary reforms may include:

(a) Raising public awareness, in particular among micro-, small- and medium-sized enterprises and individual entrepreneurs, about internationally accepted commercial law standards, the readily available tools designed to facilitate understanding and use of those standards, and commercial opportunities linked thereto (e.g. e-commerce, cross-border trade, access to domestic and foreign public procurement markets, access to credit, viable options for recovery in case of financial difficulties). Efforts should be made to seek translation of those standards into local languages, and circulating them widely, including electronically, and creating readily available local databases of those texts with links to their international source and supporting tools;

(b) Supporting community-based institutions that contribute to economic activity, empowerment of the poor, private sector development, access to justice, legal education and skills-building, such as chambers of commerce, bar associations, arbitration and conciliation centres, legal information centres and legal aid clinics;

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[11] In this regard, please consult in particular the UNCITRAL CLOUT system that relies on a network of national correspondents designated by those States that are parties to a Convention, or have enacted legislation based on a Model Law, emanated from the work of UNCITRAL, or the New York Convention www.uncitral.org/uncitral/en/case_law/national_correspondents.html.

(c) Maintaining regular dialogue with civil society organizations and groups that represent various segments of society (e.g. consumers, local communities, end-users of public services, individual entrepreneurs, micro-, small and medium-sized enterprises and academia) as regards their views on measures required to improve the commercial law framework in the State;

(d) Assisting members of academia with developing local legal doctrine on commercial law issues in line with internationally prevailing ones, in particular by facilitating establishment of, or participation in, existing regional and international exchange platforms, including electronic ones;

(e) Educating people on international commercial law issues and increasing their awareness of basic rights and obligations arising from commercial relations as directly relevant to entrepreneurship (e.g. start-up and management of business) and employment opportunities. Means of achieving that include assistance with: (i) including in curricula of schools, vocational and technical training courses and universities international commercial law subjects; (ii) organizing moot competitions and sponsoring participation of local student teams in relevant international moot competitions; [12] and (iii) raising awareness about international courses on international commercial law matters [13] and facilitating participation of interested individuals in them; and

(f) Building capacity of various actors in informal justice systems and ADR (e.g. village elders) to use mediation and conciliation skills in accordance with internationally accepted standards and to better understand international commercial law standards, apply them in a uniform way and achieve a better quality of decisions.

The UNCITRAL secretariat [14] is interested in learning about any problems encountered in practice with the implementation of this Guidance Note. It can be contacted on all issues addressed in this Guidance Note, including as regards provision of assistance with the identification of local needs for commercial law reforms, implementation of commercial law reforms and training on commercial law issues in countries of the United Nations operation and across the United Nations system.

[12] See e.g. www.cisg.law.pace.edu/vis.html.

[13] See e.g. www.itcilo.org/en/training-offer/turin-school-of-development-1.

[14] Vienna International Centre, P. O. Box 500, 1400 Vienna, Austria (e-mail: uncitral@uncitral.org, fax: (43-1-26060-5813)).

Annex

List of indicators relevant in the assessment of the state of commercial law framework in a particular country

1. The legal framework provides for the recognition and enforcement of property rights and legal relationships.

2. Local commercial law framework is compliant with internationally accepted commercial law standards:

(a) Local laws regulating commercial relations are enacted on the basis of internationally accepted commercial law standards.

3. Local capacity to implement sound commercial law reforms is continually built:

(a) Training courses on commercial law matters for government officials are held regularly [but at least twice a year];

(b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (e.g. ministry or other state agency) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(c) The number of rule-formulating activities of regional and international bodies on commercial law issues attended by local experts is steadily increasing;

(d) Local expertise on commercial law issues is centralized, readily available and easily deployed when necessary (e.g. for coordinating State's position in rule-formulating activities of regional and international bodies on commercial law issues and for identifying and following up on local needs in commercial law reforms at the local, regional and international levels);

(e) Local needs in commercial law reforms are assessed on a regular basis, including within the development assistance framework.

4. Capacity of local judges, arbitrators and other legal practitioners to understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgments and awards is adequate:

(a) Continuous learning courses for judges are held regularly [but at least twice a year] and their curricula include courses on uniform interpretation and application of internationally accepted commercial law standards;

(b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, court affiliation (e.g. court of first instance, appeal court, state or federal or supreme court) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(c) The number of local judges participating in the international judicial colloquia and other international and regional judicial training is steadily increasing;

(d) A mechanism for collecting, analysing, monitoring and publicizing national case law relating to internationally accepted commercial law standards is in place;

(e) A number of reported cases on commercial law issues referencing as appropriate internationally accepted commercial law standards is steadily increasing.

5. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment are easily accessible, affordable, efficient and effective:

(a) Alternative mechanisms for resolution of commercial disputes (commercial arbitration, mediation and conciliation) are available as an option to seek adjudication of commercial disputes in a neutral forum;

(b) Those mechanisms function on the basis of internationally accepted standards;

(c) Mechanisms to monitor speed and effectiveness of court decisions and their enforcement as well as enforcement of arbitral awards are in place.

6. People are educated on international commercial law issues, basic rights and obligations arising from commercial relations and employment opportunities linked thereto:

(a) Subjects of commercial law are included in curricula of technical schools, universities and vocational training courses;

(b) Local courses for members of academia designed to facilitate developing local legal doctrine on commercial law issues in line with internationally prevailing ones are held regularly [but at least twice a year];

(c) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (universities and other academic institutions) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(d) The number of local law students, disaggregated by gender, income and other relevant criteria, participating in local, regional and international moot competition on commercial law matters is steadily increasing.

7. Effective mechanisms for legal empowerment on commercial matters are in place:

(a) Internationally accepted commercial law standards are translated into local languages and the translation is made readily available to the public;

(b) The use of readily available authoritative sources of information on international commercial law matters, including tools designed to facilitate understanding, implementation and uniform interpretation and application of internationally accepted commercial law standards, is widely promoted;

(c) There are institutions that support economic activity, such as chambers of commerce, bar associations, commercial arbitration and conciliation centres, and they are evenly distributed throughout the country.

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Some outcome and output indicators, such as those below, although not commercial law specific, influence the effectiveness of the commercial law framework:

8. Laws, regulations and other legal texts with any amendments thereto as well as judicial decisions and administrative rulings of general application or precedent value are:

(a) Easily understood;

(b) Capable of uniform interpretation and application; and

(c) Made promptly accessible to the public.

9. The authoritative source of legal texts and other government information is widely publicised and systematically maintained;

10. Institutions and work force therein are well-structured, financed and trained;

11. There are mechanisms to monitor and oversight actions and decisions of public authorities."

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Note by the Secretariat on the status of conventions and model laws

(A/CN.9/843)

[Original: English]

1. At its thirteenth session, in 1980, the United Nations Commission on International Trade Law (UNCITRAL) decided[1] 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 (New York, 1958),[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. Technical cooperation and assistance activities aimed at promoting the use and adoption of its texts are priorities for UNCITRAL pursuant to a decision taken at its twentieth session (1987).[3] The Secretariat monitors adoption of model laws and conventions.

4. This note indicates the changes since 2 May 2014, when the last annual report in this series (A/CN.9/806) was issued. The information contained herein is current up to 4 May 2015. Authoritative information on the status of the treaties deposited with the Secretary-General of the United Nations, including historical status information, may be obtained by consulting the United Nations Treaty Collection (http://treaties.un.org), and the information on conventions in this note and on the UNCITRAL website (www.uncitral.org) is based on that information. Readers may also wish to contact 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). Information on the status of conventions and model laws is made available on the UNCITRAL website as detailed tables related to specific texts and as a single table providing an overview of all texts. Information on the status of model laws is updated on the website whenever the Secretariat is informed of a new enactment.

5. 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:

(a) In the area of sale of goods:

Convention on the Limitation Period in the International Sale of Goods, (New York, 1974),[4] as amended by the Protocol of 11 April 1980 (Vienna)[5] (as amended: 22 States parties; unamended: 29 States parties);

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[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, p. 3.

[3] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

[4] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3. For the complete status of this text, see part I, sect. A.

[5] United Nations, *Treaty Series*, vol. 1511, No. 26121, p. 99. For the complete status of this text, see part I, sect. A.

United Nations Convention on Contracts for the International Sale of Goods, (Vienna, 1980).[1] New actions by Congo (accession); Guyana (accession); and Madagascar (accession); 83 States parties;

(b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 1958).[2] New actions by Bhutan (accession); Burundi (accession); Democratic Republic of the Congo (accession); Comoros (accession); Guyana (accession); and State of Palestine;[3] 155 States parties;

UNCITRAL Model Law on International Commercial Arbitration (1985),[4] with amendments as adopted in 2006.[5] New legislation based on the Model Law as amended in 2006 has been adopted in the United Kingdom of Great Britain and Northern Ireland, in the British Virgin Islands (2013);

UNCITRAL Model Law on International Commercial Conciliation (2002);[6]

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).[7] New actions by Canada (signature); Finland (signature); France (signature); Germany (signature); Mauritius (signature); Sweden (signature); Switzerland (signature); Syrian Arab Republic (signature); United Kingdom of Great Britain and Northern Ireland (signature); and the United States of America (signature);

(c) In the area of government contracting:

UNCITRAL Model Law on Public Procurement (2011);[8]

(d) In the area of banking and payments:

United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)[9] (5 States parties);

UNCITRAL Model Law on International Credit Transfers (1992);[10]

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[11] (8 States parties);

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[1] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3. For the complete status of this text, see part I, sect. C.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. For the complete status of this text, see part I, sect. K.

[3] On 16 January 2015, Canada, Israel, and the United States of America issued communications on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, relayed as depositary notifications, with regard to the status of State of Palestine as a State (C.N.61.2015.TREATIES-XXII.1; C.N.40.2015.TREATIES-XXII.1; C.N.39.2015.TREATIES-XXII.1). On 6 February 2015, State of Palestine issued communications, relayed as depositary notifications, on the same topic (C.N.109.2015.TREATIES-XXII.1; C.N.122.2015.TREATIES-XXII.1; C.N.126.2015.TREATIES-XXII.1).

[4] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I. For the complete status of this text, see part II, sect. A.

[5] United Nations publication, Sales No. E.08.V.4. For the complete status of this text, see part II, sect. A.

[6] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I. For the complete status of this text, see part II, sect. F.

[7] General Assembly resolution 69/116, annex. The Convention has not yet entered into force; it requires three States parties for entry into force. For the complete status of this text, see part I, sect. J.

[8] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I. For the complete status of this text, see part II, sect. G.

[9] General Assembly resolution 43/165, annex. The Convention has not yet entered into force; it requires ten States parties for entry into force. For the complete status of this text, see part I, sect. D.

[10] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I. For the complete status of this text, see part II, sect. B.

[11] United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163. For the complete status of this text, see part I, sect. F.

(e) In the area of security interests:

United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[12] (1 State party);[13]

(f) In the area of insolvency:

UNCITRAL Model Law on Cross-Border Insolvency (1997).[14] New legislation based on the Model Law has been adopted in Philippines (2010); Seychelles (2013); and Vanuatu (2013);

(g) In the area of transport:

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[15] (34 States parties);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)[16] (4 States parties);

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)[17] (3 States parties);

(h) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996).[18] New legislation based on the Model Law has been adopted in Bhutan (2006); Dominica (2013); Kuwait (2014); and Madagascar (2014);

UNCITRAL Model Law on Electronic Signatures (2001).[19] New legislation based on the Model Law has been adopted in Bhutan (2006); and Madagascar (2014);

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).[20] New action by Montenegro (ratification); 6 States parties.

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[12] General Assembly resolution 56/81, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. G.

[13] Since the last report in this series, the United Nations Convention on the Assignment of Receivables in International Trade received two endorsements: International Chamber of Commerce (ICC), available from www.iccwbo.org/News/Articles/2014/ICC-endorses-UNCITRAL-Convention-on-the-Assignment-of-Receivables-in-International-Trade/; International Factors Group (IFG), available from www.ifgroup.com/wp-content/uploads/2014/12/IFG-endorsement-for-the-UN-Convention-on-the-Assignment-of-Receivables-in-International-Trade.pdf. An earlier endorsement was made in 2002: American Bar Association (ABA), available from www.americanbar.org/content/dam/aba/migrated/intlaw/policy/investment/receivablesconvention113C.authcheckdam.pdf.

[14] General Assembly resolution 52/158, annex. For the complete status of this text, see part II, sect. D.

[15] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. For the complete status of this text, see part I, sect. B.

[16] *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, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. E.

[17] General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force. For the complete status of this text, see part I, sect. I.

[18] United Nations publication, Sales No. E.99.V.4. For the complete status of this text, see part II, sect. C.

[19] General Assembly resolution 56/80, annex. For the complete status of this text, see part II, sect. E.

[20] General Assembly resolution 60/21, annex. For the complete status of this text, see part I, sect. H.

6. Previous annual reports in this series also included chronological tables of actions for conventions. To avoid redundancy, this information can now be found on the UNCITRAL website.

7. UNCITRAL texts also include legislative and legal guides and contractual standards whose impact cannot be assessed by reference to their adoption by States.[21] In this regard, part III has been added to this note in an attempt to convey the impact of other selected UNCITRAL texts. Part III includes information on the use by arbitration centres of the UNCITRAL Arbitration Rules,[22] although it should be noted that the full impact of the Rules is difficult to assess since, for example, they are widely applied in ad hoc commercial arbitration where such use is generally not reported. In addition, part III includes information on the impact on investment treaties of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014).[23]

I. Participation in conventions

A. Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 11 April 1980 (Vienna)

State	*Signature*	*Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(†)*	*Entry into force*
Argentina		19 July 1983(*)	1 August 1988
Belarus	14 June 1974	23 January 1997(*)	1 August 1997
Belgium		1 August 2008(*)	1 March 2009
Benin[a]		29 July 2011(*)	1 February 2012
Bosnia and Herzegovina[a]		12 January 1994(§)	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Burundi[a]		4 September 1998(*)	1 April 1999
Costa Rica	30 August 1974		
Cuba		2 November 1994(*)	1 June 1995
Czech Republic[b]		30 September 1993(§)	1 January 1993
Dominican Republic[d]		30 July 2010(*)	1 February 2011
Egypt		6 December 1982(*)	1 August 1988
Ghana[a]	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991(*)	1 August 1991
Hungary	14 June 1974	16 June 1983(*)	1 August 1988
Liberia		16 September 2005(†)	1 April 2006
Mexico		21 January 1988(*)	1 August 1988
Mongolia	14 June 1974		
Montenegro[e]		6 August 2012(*)	1 March 2013
Nicaragua	13 May 1975		
Norway[a,c]	11 December 1975	20 March 1980	1 August 1988
Paraguay		18 August 2003(*)	1 March 2004
Poland	14 June 1974	19 May 1995(†)	1 December 1995
Republic of Moldova		28 August 1997(*)	1 March 1998

[21] All UNCITRAL texts are available in the six official languages of the United Nations on the UNCITRAL website, www.uncitral.org.

[22] UNCITRAL Arbitration Rules (as revised in 2010), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I; UNCITRAL Arbitration Rules (1976), Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57. For the status of this text, see part III, sect. A.

[23] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I. For the status of this text, see part III, sect. B.

State	Signature	Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(†)	Entry into force
Romania		23 April 1992(†)	1 November 1992
Russian Federation	14 June 1974		
Serbia[a]		12 March 2001(§)	27 April 1992
Slovakia[b]		28 May 1993(§)	1 January 1993
Slovenia		2 August 1995(†)	1 March 1996
Uganda		12 February 1992(†)	1 September 1992
Ukraine[a]	14 June 1974	13 September 1993	1 April 1994
United States of America[b]		5 May 1994(†)	1 December 1994
Uruguay		1 April 1997(†)	1 November 1997
Zambia		6 June 1986(*)	1 August 1988

Parties (as amended by the Protocol of 1980): 22
Parties (unamended): 29

For information on which States listed above are Parties to the 1980 amending Protocol, consult the United Nations Treaty Collection, http://treaties.un.org.

[a] Party only to the unamended Convention.

[b] Upon accession to the Protocol, Czechoslovakia and the United States of America declared that, pursuant to article XII of the Protocol, they did not consider themselves bound by article I of the Protocol.

[c] 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).

[d] From 1 August 1988 to 31 January 2011, the Dominican Republic was a Party to the unamended Convention.

[e] From 3 June 2006 to 28 February 2013, Montenegro was a Party to the unamended Convention.

B. United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Albania		20 July 2006(*)	1 August 2007
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981(*)	1 November 1992
Botswana		16 February 1988(*)	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989(*)	1 November 1992
Burundi		4 September 1998(*)	1 October 1999
Cameroon		21 October 1993(*)	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Czech Republic[a]	2 June 1993	23 June 1995	1 July 1996
Democratic Republic of the Congo	19 April 1979		
Denmark	18 April 1979		
Dominican Republic		28 September 2007(*)	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(*)	1 March 1997
Georgia		21 March 1996(*)	1 April 1997
Germany	31 March 1978		
Ghana	31 March 1978		

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Guinea		23 January 1991(*)	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Jordan		10 May 2001(*)	1 June 2002
Kazakhstan		18 June 2008(*)	1 July 2009
Kenya		31 July 1989(*)	1 November 1992
Lebanon		4 April 1983(*)	1 November 1992
Lesotho		26 October 1989(*)	1 November 1992
Liberia		16 September 2005(*)	1 October 2006
Madagascar	31 March 1978		
Malawi		18 March 1991(*)	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981(*)	1 November 1992
Nigeria		7 November 1988(*)	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Paraguay		19 July 2005(*)	1 August 2006
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982(*)	1 November 1992
Saint Vincent and the Grenadines		12 September 2000(*)	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	28 May 1993		
Sweden	18 April 1979		
Syrian Arab Republic		16 October 2002(*)	1 November 2003
Tunisia		15 September 1980(*)	1 November 1992
Uganda		6 July 1979(*)	1 November 1992
United Republic of Tanzania		24 July 1979(*)	1 November 1992
United States of America	30 April 1979		
Venezuela (Bolivarian Republic of)	31 March 1978		
Zambia		7 October 1991(*)	1 November 1992

Parties: 34

[a] The Czech Republic declared that limits of carrier's liability in the territory of the Czech Republic adhered to the provision of article 6 of the Convention.

C. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Albania		13 May 2009(*)	1 June 2010
Argentina[a]		19 July 1983(*)	1 January 1988
Armenia[a,b]		2 December 2008(*)	1 January 2010
Australia		17 March 1988(*)	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Bahrain		25 September 2013	1 October 2014

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Belarus[a]		9 October 1989(*)	1 November 1990
Belgium		31 October 1996(*)	1 November 1997
Benin		29 July 2011(*)	1 August 2012
Bosnia and Herzegovina		12 January 1994(§)	6 March 1992
Brazil		4 March 2013(*)	1 April 2014
Bulgaria		9 July 1990(*)	1 August 1991
Burundi		4 September 1998(*)	1 October 1999
Canada[c]		23 April 1991(*)	1 May 1992
Chile[a]	11 April 1980	7 February 1990	1 March 1991
China[a,b]	30 September 1981	11 December 1986(†)	1 January 1988
Colombia		10 July 2001(*)	1 August 2002
Congo		11 June 2014(*)	1 July 2015
Croatia		8 June 1998(§)	8 October 1991
Cuba		2 November 1994(*)	1 December 1995
Cyprus		7 March 2005(*)	1 April 2006
Czech Republic[b]		30 September 1993(§)	1 January 1993
Denmark[d]	26 May 1981	14 February 1989	1 March 1990
Dominican Republic		7 June 2010(*)	1 July 2011
Ecuador		27 January 1992(*)	1 February 1993
Egypt		6 December 1982(*)	1 January 1988
El Salvador		27 November 2006(*)	1 December 2007
Estonia		20 September 1993(*)	1 October 1994
Finland[d]	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982(†)	1 January 1988
Gabon		15 December 2004(*)	1 January 2006
Georgia		16 August 1994(*)	1 September 1995
Germany[e]	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Greece		12 January 1998(*)	1 February 1999
Guinea		23 January 1991(*)	1 February 1992
Guyana		25 September 2014(*)	1 October 2015
Honduras		10 October 2002(*)	1 November 2003
Hungary[a,f]	11 April 1980	16 June 1983	1 January 1988
Iceland[d]		10 May 2001(*)	1 June 2002
Iraq		5 March 1990(*)	1 April 1991
Israel		22 January 2002(*)	1 February 2003
Italy	30 September 1981	11 December 1986	1 January 1988
Japan		1 July 2008(*)	1 August 2009
Kyrgyzstan		11 May 1999(*)	1 June 2000
Latvia[a]		31 July 1997(*)	1 August 1998
Lebanon		21 November 2008(*)	1 December 2009
Lesotho	18 June 1981	18 June 1981	1 January 1988
Liberia		16 September 2005(*)	1 October 2006
Lithuania		18 January 1995(*)	1 February 1996
Luxembourg		30 January 1997(*)	1 February 1998
Madagascar		24 September 2014(*)	1 October 2015
Mauritania		20 August 1999(*)	1 September 2000
Mexico		29 December 1987(*)	1 January 1989
Mongolia		31 December 1997(*)	1 January 1999
Montenegro		23 October 2006(§)	3 June 2006
Netherlands	29 May 1981	13 December 1990(‡)	1 January 1992
New Zealand		22 September 1994(*)	1 October 1995
Norway[d]	26 May 1981	20 July 1988	1 August 1989
Paraguay[a]		13 January 2006(*)	1 February 2007

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Peru		25 March 1999(*)	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Korea		17 February 2004(*)	1 March 2005
Republic of Moldova		13 October 1994(*)	1 November 1995
Romania		22 May 1991(*)	1 June 1992
Russian Federation[a]		16 August 1990(*)	1 September 1991
Saint Vincent and the Grenadines[b]		12 September 2000(*)	1 October 2001
San Marino		22 February 2012(*)	1 March 2013
Serbia		12 March 2001(§)	27 April 1992
Singapore[b]	11 April 1980	16 February 1995	1 March 1996
Slovakia[b]		28 May 1993(§)	1 January 1993
Slovenia		7 January 1994(§)	25 June 1991
Spain		24 July 1990(*)	1 August 1991
Sweden[d]	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990(*)	1 March 1991
Syrian Arab Republic		19 October 1982(*)	1 January 1988
The former Yugoslav Republic of Macedonia		22 November 2006(§)	17 November 1991
Turkey		7 July 2010(*)	1 August 2011
Uganda		12 February 1992(*)	1 March 1993
Ukraine[a]		3 January 1990(*)	1 February 1991
United States of America[b]	31 August 1981	11 December 1986	1 January 1988
Uruguay		25 January 1999(*)	1 February 2000
Uzbekistan		27 November 1996(*)	1 December 1997
Venezuela (Bolivarian Republic of)	28 September 1981		
Zambia		6 June 1986(*)	1 January 1988

Parties: 83

[a] 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 his place of business in its territory.

[b] This State declared that it would not be bound by paragraph 1 (b) of article 1.

[c] 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. 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.

[d] Denmark, Finland, Iceland, Norway and Sweden declared that the Convention would not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

[e] 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).

[f] 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.

D. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Canada	7 December 1989	
Gabon		15 December 2004(*)
Guinea		23 January 1991(*)
Honduras		8 August 2001(*)
Liberia		16 September 2005(*)
Mexico		11 September 1992(*)
Russian Federation	30 June 1990	
United States of America	29 June 1990	

Parties: 5

E. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Egypt		6 April 1999(*)
France	15 October 1991	
Gabon		15 December 2004(*)
Georgia		21 March 1996(*)
Mexico	19 April 1991	
Paraguay		19 July 2005(*)
Philippines	19 April 1991	
Spain	19 April 1991	
United States of America	30 April 1992	

Parties: 4

F. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Belarus	3 December 1996	23 January 2002	1 February 2003
Ecuador		18 June 1997(*)	1 January 2000
El Salvador	5 September 1997	31 July 1998	1 January 2000
Gabon		15 December 2004(*)	1 January 2006
Kuwait		28 October 1998(*)	1 January 2000
Liberia		16 September 2005(*)	1 October 2006
Panama	9 July 1997	21 May 1998	1 January 2000
Tunisia		8 December 1998(*)	1 January 2000
United States of America	11 December 1997		

Parties: 8

G. United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Liberia		16 September 2005(*)
Luxembourg[a]	12 June 2002	
Madagascar	24 September 2003	
United States of America	30 December 2003	

Party: 1

It should be noted that the principles of the Convention were incorporated into the UNCITRAL Legislative Guide on Secured Transactions (2007). [24] Thus, States that substantially implement the recommendations of the Guide have, at the same time, introduced the principles of the Convention into their domestic law.

[a] 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."

H. United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Central African Republic	27 February 2006		
China	6 July 2006		
Colombia	27 September 2007		
Congo		28 January 2014(*)	1 August 2014
Dominican Republic		2 August 2012(*)	1 March 2013
Honduras	16 January 2008	15 June 2010	1 March 2013
Iran (Islamic Republic of)	26 September 2007		
Lebanon	22 May 2006		
Madagascar	19 September 2006		
Montenegro	27 September 2007	23 September 2014	1 April 2015
Panama	25 September 2007		
Paraguay	26 March 2007		
Philippines	25 September 2007		
Republic of Korea	15 January 2008		
Russian Federation[b]	25 April 2007	6 January 2014(‡)	1 August 2014
Saudi Arabia	12 November 2007		
Senegal	7 April 2006		
Sierra Leone	21 September 2006		
Singapore[a]	6 July 2006	7 July 2010	1 March 2013
Sri Lanka	6 July 2006		

Parties: 6

[24] United Nations publication, Sales No. E.09.V.12.

Information on jurisdictions enacting at the national level substantive provisions of the Convention is included in the status information for the UNCITRAL Model Law on Electronic Commerce (1996) (see part II, sect. C).

[a] Upon ratification, Singapore declared: The Convention shall not apply to electronic communications relating to any contract for the sale or other disposition of immovable property, or any interest in such property. The Convention shall also not apply in respect of (i) the creation or execution of a will; or (ii) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, that may be contracted for in any contract governed by the Convention.

[b] Upon acceptance, the Russian Federation declared:

1. In accordance with article 19, paragraph 1, of the Convention, the Russian Federation will apply the Convention when the parties to the international contract have agreed that it applies;

2. In accordance with article 19, paragraph 2, of the Convention, the Russian Federation will not apply the Convention to transactions for which a notarized form or State registration is required under Russian law or to transactions for the sale of goods whose transfer across the Customs Union border is either prohibited or restricted;

3. The Russian Federation understands the international contracts covered by the Convention to mean civil law contracts involving foreign citizens or legal entities, or a foreign element.

I. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Armenia	29 September 2009	
Cameroon	29 September 2009	
Congo	23 September 2009	28 January 2014
Democratic Republic of the Congo	23 September 2010	
Denmark	23 September 2009	
France	23 September 2009	
Gabon	23 September 2009	
Ghana	23 September 2009	
Greece	23 September 2009	
Guinea	23 September 2009	
Guinea-Bissau	24 September 2013	
Luxembourg	31 August 2010	
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	19 January 2011
Sweden	20 July 2011	
Switzerland	23 September 2009	
Togo	23 September 2009	17 July 2012
United States of America	23 September 2009	

Parties: 3

J. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Canada	17 March 2015	
Finland	17 March 2015	
France	17 March 2015	
Germany	17 March 2015	
Mauritius	17 March 2015	
Sweden	17 March 2015	
Switzerland	27 March 2015	
Syrian Arab Republic	24 March 2015	
United Kingdom of Great Britain and Northern Ireland	17 March 2015	
United States of America	17 March 2015	

Parties: 0

K. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Afghanistan[a,c]		30 November 2004(*)	28 February 2005
Albania		27 June 2001(*)	25 September 2001
Algeria[a,c]		7 February 1989(*)	8 May 1989
Antigua and Barbuda[a,c]		2 February 1989(*)	3 May 1989
Argentina[a,c]	26 August 1958	14 March 1989	12 June 1989
Armenia[a,c]		29 December 1997(*)	29 March 1998
Australia		26 March 1975(*)	24 June 1975
Austria		2 May 1961(*)	31 July 1961
Azerbaijan		29 February 2000(*)	29 May 2000
Bahamas		20 December 2006(*)	20 March 2007
Bahrain[a,c]		6 April 1988(*)	5 July 1988
Bangladesh		6 May 1992(*)	4 August 1992
Barbados[a,c]		16 March 1993(*)	14 June 1993
Belarus[b]	29 December 1958	15 November 1960	13 February 1961
Belgium[a]	10 June 1958	18 August 1975	16 November 1975
Benin		16 May 1974(*)	14 August 1974
Bhutan[a,c]		25 September 2014(*)	24 December 2014
Bolivia (Plurinational State of)		28 April 1995(*)	27 July 1995
Bosnia and Herzegovina[a,c,i]		1 September 1993(§)	6 March 1992
Botswana[a,c]		20 December 1971(*)	19 March 1972
Brazil		7 June 2002(*)	5 September 2002
Brunei Darussalam[a]		25 July 1996(*)	23 October 1996
Bulgaria[a,b]	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987(*)	21 June 1987
Burundi[c]		23 June 2014(*)	21 September 2014
Cambodia		5 January 1960(*)	4 April 1960
Cameroon		19 February 1988(*)	19 May 1988
Canada[d]		12 May 1986(*)	10 August 1986

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Central African Republic[a,c]		15 October 1962(*)	13 January 1963
Chile		4 September 1975(*)	3 December 1975
China[a,c,h]		22 January 1987(*)	22 April 1987
Colombia		25 September 1979(*)	24 December 1979
Comoros		28 April 2015	27 July 2015
Cook Islands		12 January 2009(*)	12 April 2009
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d'Ivoire		1 February 1991(*)	2 May 1991
Croatia[a,c,i]		26 July 1993(§)	8 October 1991
Cuba[a,c]		30 December 1974(*)	30 March 1975
Cyprus[a,c]		29 December 1980(*)	29 March 1981
Czech Republic[a,b]		30 September 1993(§)	1 January 1993
Democratic Republic of the Congo		5 November 2014(*)	3 February 2015
Denmark[a,c,f]		22 December 1972(*)	22 March 1973
Djibouti[a,c]		14 June 1983(§)	27 June 1977
Dominica		28 October 1988(*)	26 January 1989
Dominican Republic		11 April 2002(*)	10 July 2002
Ecuador[a,c]	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959(*)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993(*)	28 November 1993
Fiji		27 September 2010(*)	26 December 2010
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(*)	15 March 2007
Georgia		2 June 1994(*)	31 August 1994
Germany	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968(*)	8 July 1968
Greece[a,c]		16 July 1962(*)	14 October 1962
Guatemala[a,c]		21 March 1984(*)	19 June 1984
Guinea		23 January 1991(*)	23 April 1991
Guyana		25 September 2014(*)	24 December 2014
Haiti		5 December 1983(*)	4 March 1984
Holy See[a,c]		14 May 1975(*)	12 August 1975
Honduras		3 October 2000(*)	1 January 2001
Hungary[a,c]		5 March 1962(*)	3 June 1962
Iceland		24 January 2002(*)	24 April 2002
India[a,c]	10 June 1958	13 July 1960	11 October 1960
Indonesia[a,c]		7 October 1981(*)	5 January 1982
Iran (Islamic Republic of)[a,c]		15 October 2001(*)	13 January 2002
Ireland[a]		12 May 1981(*)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959
Italy		31 January 1969(*)	1 May 1969
Jamaica[a,c]		10 July 2002(*)	8 October 2002
Japan[a]		20 June 1961(*)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995(*)	18 February 1996
Kenya[a]		10 February 1989(*)	11 May 1989
Kuwait[a]		28 April 1978(*)	27 July 1978
Kyrgyzstan		18 December 1996(*)	18 March 1997
Lao People's Democratic Republic		17 June 1998(*)	15 September 1998

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Latvia		14 April 1992(*)	13 July 1992
Lebanon[a]		11 August 1998(*)	9 November 1998
Lesotho		13 June 1989(*)	11 September 1989
Liberia		16 September 2005(*)	15 December 2005
Liechtenstein[a]		7 July 2011(*)	5 October 2011
Lithuania[b]		14 March 1995(*)	12 June 1995
Luxembourg[a]	11 November 1958	9 September 1983	8 December 1983
Madagascar[a,c]		16 July 1962(*)	14 October 1962
Malaysia[a,c]		5 November 1985(*)	3 February 1986
Mali		8 September 1994(*)	7 December 1994
Malta[a,i]		22 June 2000(*)	20 September 2000
Marshall Islands		21 December 2006(*)	21 March 2007
Mauritania		30 January 1997(*)	30 April 1997
Mauritius		19 June 1996(*)	17 September 1996
Mexico		14 April 1971(*)	13 July 1971
Monaco[a,c]	31 December 1958	2 June 1982	31 August 1982
Mongolia[a,c]		24 October 1994(*)	22 January 1995
Montenegro[a,c,i]		23 October 2006(§)	3 June 2006
Morocco[a]		12 February 1959(*)	7 June 1959
Mozambique[a]		11 June 1998(*)	9 September 1998
Myanmar		16 April 2013(*)	15 July 2013
Nepal[a,c]		4 March 1998(*)	2 June 1998
Netherlands[a,e]	10 June 1958	24 April 1964	23 July 1964
New Zealand[a]		6 January 1983(*)	6 April 1983
Nicaragua		24 September 2003(*)	23 December 2003
Niger		14 October 1964(*)	12 January 1965
Nigeria[a,c]		17 March 1970(*)	15 June 1970
Norway[a,j]		14 March 1961(*)	12 June 1961
Oman		25 February 1999(*)	26 May 1999
Pakistan[a]	30 December 1958	14 July 2005	12 October 2005
Panama		10 October 1984(*)	8 January 1985
Paraguay		8 October 1997(*)	6 January 1998
Peru		7 July 1988(*)	5 October 1988
Philippines[a,c]	10 June 1958	6 July 1967	4 October 1967
Poland[a,c]	10 June 1958	3 October 1961	1 January 1962
Portugal[a]		18 October 1994(*)	16 January 1995
Qatar		30 December 2002(*)	30 March 2003
Republic of Korea[a,c]		8 February 1973(*)	9 May 1973
Republic of Moldova[a,i]		18 September 1998(*)	17 December 1998
Romania[a,b,c]		13 September 1961(*)	12 December 1961
Russian Federation[b]	29 December 1958	24 August 1960	22 November 1960
Rwanda		31 October 2008	29 January 2009
Saint Vincent and the Grenadines[a,c]		12 September 2000(*)	11 December 2000
San Marino		17 May 1979(*)	15 August 1979
Sao Tome and Principe		20 November 2012(*)	18 February 2013
Saudi Arabia[a]		19 April 1994(*)	18 July 1994
Senegal		17 October 1994(*)	15 January 1995
Serbia[a,c,i]		12 March 2001(§)	27 April 1992
Singapore[a]		21 August 1986(*)	19 November 1986
Slovakia[a,b]		28 May 1993(§)	1 January 1993
Slovenia[i]		6 July 1992(§)	25 June 1991
South Africa		3 May 1976(*)	1 August 1976
Spain		12 May 1977(*)	10 August 1977

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
State of Palestine		2 January 2015(*)	2 April 2015
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(*)	7 June 1959
Tajikistan[a,i,j]		14 August 2012(*)	12 November 2012
Thailand		21 December 1959(*)	20 March 1960
The former Yugoslav Republic of Macedonia[c,i]		10 March 1994(§)	17 November 1991
Trinidad and Tobago[a,c]		14 February 1966(*)	15 May 1966
Tunisia[a,c]		17 July 1967(*)	15 October 1967
Turkey[a,c]		2 July 1992(*)	30 September 1992
Uganda[a]		12 February 1992(*)	12 May 1992
Ukraine[b]	29 December 1958	10 October 1960	8 January 1961
United Arab Emirates		21 August 2006(*)	19 November 2006
United Kingdom of Great Britain and Northern Ireland[a,g]		24 September 1975(*)	23 December 1975
United Republic of Tanzania[a]		13 October 1964(*)	11 January 1965
United States of America[a,c]		30 September 1970(*)	29 December 1970
Uruguay		30 March 1983(*)	28 June 1983
Uzbekistan		7 February 1996(*)	7 May 1996
Venezuela (Bolivarian Republic of)[a,c]		8 February 1995(*)	9 May 1995
Viet Nam[a,b,c]		12 September 1995(*)	11 December 1995
Zambia		14 March 2002(*)	12 June 2002
Zimbabwe		29 September 1994(*)	28 December 1994

Parties: 155

Declarations or other notifications pursuant to article I(3) and article X(1)

[a] This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

[b] 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.

[c] 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.

[d] 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.

[e] On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.

[f] On 10 February 1976, Denmark declared that the Convention shall apply to the Faroe Islands and Greenland.

[g] On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands. For the following territories, the United Kingdom has submitted notifications extending territorial application and declaring that the Convention shall apply only to the recognition and enforcement of awards made in the territory of another Contracting State: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Bailiwick of Jersey (28 May 2002).

[h] 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.

Reservations or other notifications

[i] This State formulated a reservation with regards to retroactive application of the Convention.

[j] This State formulated a reservation with regards to the application of the Convention in cases concerning immovable property.

II. Enactments of model laws[25]

A. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

8. Legislation based on the Model Law has been adopted in 67 States in a total of 97 jurisdictions:

Armenia (2006); Australia (2010[a,c]), in New South Wales (2010[a]), Northern Territory (2011[a]), Queensland (2013[a]), South Australia (2011[a]), Tasmania (2011[a]), Victoria (2011[a]), and Western Australia (2012[a]); Austria (2006); Azerbaijan (1999); Bahrain (1994); Bangladesh (2001); Belarus (1999); Belgium (2013[a]); Brunei Darussalam (2009[a]); Bulgaria (2002[c]); Cambodia (2006); Canada (1986), in Alberta (1986), British Columbia (1986), Manitoba (1986), New Brunswick (1986), Newfoundland and Labrador (1986), Northwest Territories (1986), Nova Scotia (1986), Nunavut (1999), Ontario (1987), Prince Edward Island (1986), Quebec (1986), Saskatchewan (1988), and Yukon (1986); Chile (2004); China, in Hong Kong, China (2010[a,c]) and Macao, China (1998); Costa Rica (2011[a]); Croatia (2001); Cyprus (1987); Denmark (2005); Dominican Republic (2008); Egypt (1994); Estonia (2006); Georgia (2009[a]); Germany (1998); Greece (1999); Guatemala (1995); Honduras (2000); Hungary (1994); India (1996); Iran (Islamic Republic of) (1997); Ireland (2010[a,c]); Japan (2003); Jordan (2001); Kenya (1995); Lithuania (2012[a,c]); Madagascar (1998); Malaysia (2005); Malta (1996); Mauritius (2008[a]); Mexico (1993); New Zealand (2007[a,c]); Nicaragua (2005); Nigeria (1990); Norway (2004); Oman (1997); Paraguay (2002); Peru (2008[a,c]); Philippines (2004); Poland (2005); Republic of Korea (1999); Russian Federation (1993); Rwanda (2008[a]); Serbia (2006); Singapore (1994[d]); Slovenia (2008[a]); Spain (2003); Sri Lanka (1995); Thailand (2002); the former Yugoslav Republic of Macedonia (2006); Tunisia (1993); Turkey (2001); Uganda (2000); Ukraine (1994); United Kingdom of Great Britain and Northern Ireland, in Bermuda (1993[b]), British Virgin Islands (2013[a,b]), and Scotland (1990); United States of America, in California (1988), Connecticut (1989), Florida (2010[a]), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991), and Texas (1989); Venezuela (Bolivarian Republic of) (1998); Zambia (2000); and Zimbabwe (1996).

[a] Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.

[b] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

[c] The legislation amends previous legislation based on the Model Law.

[d] The legislation has been further amended in 2001, 2003, 2005 and 2009.

B. UNCITRAL Model Law on International Credit Transfers (1992)

9. 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.

[25] Since States enacting legislation based upon a model law have the flexibility to depart from the text, these lists are only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment provided in this note is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment. In addition, there may be subsequent amending or repealing legislation that has not been made known to the UNCITRAL Secretariat.

C. UNCITRAL Model Law on Electronic Commerce (1996)

10. Legislation based on or influenced by the Model Law has been adopted in 63 States in a total of 138 jurisdictions:

Antigua and Barbuda (2006[d]); Australia (2011[e,h]), in Australian Capital Territory (2012[e,h]), New South Wales (2010[e,h]), Northern Territory (2011[e,h]), Queensland (2013[e,h]), South Australia (2011[e,h]), Tasmania (2010[e,h]), Victoria (2011[e,h]), and Western Australia (2011[e,h]); Bahrain (2002); Bangladesh (2006[a,d]); Barbados (2001); Belize (2003); Bhutan (2006); Brunei Darussalam (2000); Canada, in Alberta (2001[b]), British Columbia (2001[b]), Manitoba (2000[b]), New Brunswick (2001[b]), Newfoundland and Labrador (2001[b]), Northwest Territories (2011[b]), Nova Scotia (2000[b]), Nunavut (2004[b]), Ontario (2001[b]), Prince Edward Island (2001[b]), Quebec (2001[d]), Saskatchewan (2000[b]), and Yukon (2000[b]); Cape Verde (2003); China (2004), in Hong Kong, China (2000), and Macao, China (2005[d,h]); Colombia (1999[a]); Dominica (2013[e]); Dominican Republic (2002[a]); Ecuador (2002[a]); Fiji (2008); France (2000); Gambia (2009[e]); Ghana (2008[e]); Grenada (2008); Guatemala (2008[e]); India (2000[a]); Iran (Islamic Republic of) (2004); Ireland (2000); Jamaica (2006); Jordan (2001); Kuwait (2014[a,d]); Lao People's Democratic Republic (2012[a]); Liberia (2002[a]); Madagascar (2014[e]); Malaysia (2006); Mauritius (2000); Mexico (2000); New Zealand (2002); Oman (2008[a]); Pakistan (2002); Panama (2001[a]); Paraguay (2010); Philippines (2000); Qatar (2010[e]); Republic of Korea (1999); Rwanda (2010[e]); Saint Kitts and Nevis (2011[e]); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); Samoa (2008); San Marino (2013[e]); Saudi Arabia (2007); Seychelles (2001[a]); Singapore (2010[e,h]); Slovenia (2000); South Africa (2002[a]); Sri Lanka (2006); Syrian Arab Republic (2014[a,d]); Thailand (2002); Trinidad and Tobago (2011[e]); United Arab Emirates (2006); United Kingdom of Great Britain and Northern Ireland, in Bailiwick of Guernsey (2000[f]), Bailiwick of Jersey (2000[f]), Bermuda (1999[g]), Cayman Islands (2000[g]), Isle of Man (2000[f]), and the Turks and Caicos Islands (2000[g]); United States of America, in Alabama (2001[c]), Alaska (2004[c]), Arizona (2000[c]), Arkansas (2001[c]), California (1999[c]), Colorado (2002[c]), Connecticut (2002[c]), Delaware (2000[c]), District of Columbia (2001[c]), Florida (2000[c]), Georgia (2009[c]), Hawaii (2000[c]), Idaho (2000[c]), Illinois (1998), Indiana (2000[c]), Iowa (2000[c]), Kansas (2000[c]), Kentucky (2000[c]), Louisiana (2001[c]), Maine (2000[c]), Maryland (2000[c]), Massachusetts (2003[c]), Michigan (2000[c]), Minnesota (2000[c]), Mississippi (2001[c]), Missouri (2003[c]), Montana (2001[c]), Nebraska (2000[c]), Nevada (2001[c]), New Hampshire (2001[c]), New Jersey (2000[c]), New Mexico (2001[c]), North Carolina (2000[c]), North Dakota (2001[c]), Ohio (2000[c]), Oklahoma (2000[c]), Oregon (2001[c]), Pennsylvania (1999[c]), Rhode Island (2000[c]), South Carolina (2004[c]), South Dakota (2000[c]), Tennessee (2001[c]), Texas (2001[c]), Utah (2000[c]), Vermont (2003[c]), Virginia (2000[c]), West Virginia (2001[c]), Wisconsin (2004[c]), and Wyoming (2001[c]); Vanuatu (2000); Venezuela (Bolivarian Republic of) (2001); Viet Nam (2005[e]); and Zambia (2009[e]).

[a] Except for the provisions on certification and electronic signatures.

[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada.

[c] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law.

[d] The legislation is influenced by the Model Law and the principles on which it is based.

[e] The legislation also includes substantive provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts, the status of which can be found in part I, sect. H.

[f] Crown Dependency of the United Kingdom of Great Britain and Northern Ireland.

[g] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

[h] The legislation amends previous legislation based on the Model Law.

D. UNCITRAL Model Law on Cross-Border Insolvency (1997)

11. Legislation based on the Model Law has been adopted in 22 States in a total of 23 jurisdictions:

Australia (2008); Canada (2005); Chile (2014); Colombia (2006); Greece (2010); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Philippines (2010); Poland (2003); Republic of Korea (2006); Romania (2002); Serbia (2004); Seychelles (2013); Slovenia (2007); South Africa (2000); Uganda (2011); United Kingdom of Great Britain and Northern Ireland, in Great Britain (2006), and the British Virgin Islands (2003a); United States of America (2005); and Vanuatu (2013).

E. UNCITRAL Model Law on Electronic Signatures (2001)

12. Legislation based on or influenced by the Model Law has been adopted in 31 States:

Antigua and Barbuda (2006); Barbados (2001); Bhutan (2006); Cape Verde (2003); China (2004); Colombia (2012); Costa Rica (2005[a]); Gambia (2009); Ghana (2008); Grenada (2008); Guatemala (2008); Honduras (2013); India (2009[a]); Jamaica (2006); Madagascar (2014); Mexico (2003); Nicaragua (2010[a]); Oman (2008[a]); Paraguay (2010); Qatar (2010); Rwanda (2010); Saint Kitts and Nevis (2011); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); San Marino (2013); Saudi Arabia (2007[a]); Thailand (2001); Trinidad and Tobago (2011); United Arab Emirates (2006); Viet Nam (2005); and Zambia (2009).

[a] The legislation is influenced by the Model Law and the principles on which it is based.

F. UNCITRAL Model Law on International Commercial Conciliation (2002)

13. Legislation based on or influenced by the Model Law has been adopted in 14 States in a total of 26 jurisdictions:

Albania (2011[d]); Belgium (2005); Canada, in Nova Scotia (2005[b]), and Ontario (2010[b]); Croatia (2003); France (2011[c]); Honduras (2000); Hungary (2002); Luxembourg (2012); Montenegro (2005[c]); Nicaragua (2005); Slovenia (2008); Switzerland (2008[c]); the former Yugoslav Republic of Macedonia (2009); United States of America, in the District of Columbia (2006[a]), Hawaii (2013[a]); Idaho (2008[a]), Illinois (2004[a]), Iowa (2005[a]), Nebraska (2003[a]), New Jersey (2004[a]), Ohio (2005[a]), South Dakota (2007[a]), Utah (2006[a]), Vermont (2005[a]), and Washington (2005[a]).

[a] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws.

[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform [International] Commercial Mediation Act, adopted in 2005 by the Uniform Law Conference of Canada.

[c] The legislation is influenced by the Model Law and the principles on which it is based.

[d] The legislation amends previous legislation based on the Model Law.

G. UNCITRAL Model Law on Public Procurement (2011)[26]

14. The following States have used the Model Law and accompanying Guide to Enactment[27] in reforming their public procurement law and systems (the extent to which the

[26] The UNCITRAL Model Law on Public Procurement (2011) is a revision of the UNCITRAL Model Law on Procurement of Goods and Construction (1993), *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), annex I. Historical status information on the UNCITRAL Model Law on Procurement of Goods and Construction (1993) is available on the UNCITRAL website, www.uncitral.org/uncitral/uncitral_texts.html.

[27] Available from www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

resulting regulatory framework reflects the provisions of the Model Law varies, as that framework also reflects legal traditions, domestic policy and other objectives):

India, Jamaica, Kazakhstan, Kyrgyzstan, Mexico, Myanmar, Russian Federation, Rwanda, Tajikistan, Trinidad and Tobago, Uganda, United Republic of Tanzania, Uzbekistan, and Zambia.

15. The following organizations use the Model Law and accompanying Guide to Enactment as a benchmark for public procurement law reform in countries of their operation:

European Bank for Reconstruction and Development, Inter-American Development Bank, Organisation for Economic Co-operation and Development, and the World Bank.

III. Status of other UNCITRAL texts

A. UNCITRAL Arbitration Rules

16. The following table presents a non-exhaustive list of arbitration centres which (i) have institutional rules based on, or inspired by, the UNCITRAL Arbitration Rules, (ii) administer arbitral proceedings or provide administrative services under the Rules, and/or (iii) act as an appointing authority under the Rules.

State	*Name of the arbitration centre*	*With institutional Rules based on or inspired by the UNCITRAL Arbitration Rules*	*Administering arbitral proceedings under the UNCITRAL Arbitration Rules or providing some administrative services*	*Acting as appointing authority under the UNCITRAL Arbitration Rules*
Australia	Australian Centre for International Commercial Arbitration (ACICA)			x
	Institute of Arbitrators & Mediators Australia (IAMA)	x	x	x
Austria	Vienna International Arbitration Centre (VIAC)		x	x
Bahrain	Bahrain Chamber for Dispute Resolution (BCDR-AAA)			x
Belgium	Belgian Centre for Arbitration and Mediation (CEPANI)	x		x
Brazil	Centro de Arbitragem e Mediação, Câmara de Comércio Brasil-Canadá (CCBC)			x
	Tribunal Arbitral de São Paulo	x		x
Canada	British Columbia International Commercial Arbitration Centre (BCICAC)			x
China	China International Economic and Trade Arbitration Commission (CIETAC)		x	x
Hong Kong, China	Hong Kong International Arbitration Centre (HKIAC)	x	x	x
	CIETAC Hong Kong Arbitration Centre		x	x
Cyprus	Cyprus Arbitration and Mediation Centre (CAMC)	x		
Czech Republic	Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of Czech Republic (CAC)		x	x
Denmark	Danish Institute of Arbitration	x	x	x
Egypt	Cairo Regional Centre for International Commercial Arbitration (CRCICA)	x	x	x

State	*Name of the arbitration centre*	*With institutional Rules based on or inspired by the UNCITRAL Arbitration Rules*	*Administering arbitral proceedings under the UNCITRAL Arbitration Rules or providing some administrative services*	*Acting as appointing authority under the UNCITRAL Arbitration Rules*
Finland	Arbitration Institute of the Finland Chamber of Commerce (FAI)			x
France	International Chamber of Commerce, International Court of Arbitration (ICC)			x
Germany	German Institution of Arbitration (DIS)		x	x
India	Indian Institute of Arbitration and Mediation (IIAM)	x	x	x
	Bangalore International Mediation Arbitration & Conciliation Centre (BIMACC)		x	x
Indonesia	Indonesian National Board of Arbitration (BANI)		x	x
Iran (Islamic Republic of)	Tehran Regional Arbitration Centre (TRAC)	x	x	x
Italy	Chamber of Arbitration of Milan (Camera Arbitrale Milano) of the Chamber of Commerce of Milan			x
Japan	Japan Commercial Arbitration Association (JCAA)		x	x
Malaysia	Kuala Lumpur Regional Centre for Arbitration (KLRCA)	x	x	x
Mauritius	LCIA-Mauritius International Arbitration Centre (LCIA-MIAC)			x
Mexico	Centro de Mediación y Arbitraje (CANACO)		x	x
	Centro de Arbitraje de México (CAM)			x
Mongolia	Mongolian International National Arbitration Centre (MINAC)	x		
Netherlands	Permanent Court of Arbitration at The Hague (PCA)	x	x	x
	PRIME Finance Foundation	x	x	x
Nigeria	Regional Centre for International Commercial Arbitration-Lagos	x		x
Norway	Arbitration Institute of the Oslo Chamber of Commerce		x	x
Peru	Centro de Arbitraje de la Cámara de Comercio de Lima (CCL)			x
Portugal	Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa			x
Qatar	Qatar International Center for Conciliation and Arbitration (QICCA)	x	x	x
Republic of Korea	Korean Commercial Arbitration Board (KCAB)	x	x	x
Russian Federation	International Commercial Arbitration Court (ICAC) at the Russian Federation Chamber of Commerce and Industry			x

State	*Name of the arbitration centre*	*With institutional Rules based on or inspired by the UNCITRAL Arbitration Rules*	*Administering arbitral proceedings under the UNCITRAL Arbitration Rules or providing some administrative services*	*Acting as appointing authority under the UNCITRAL Arbitration Rules*
Singapore	Singapore International Arbitration Centre (SIAC)	x	x	x
Slovenia	Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC)	x	x	x
South Africa	Arbitration Foundation of South Africa (AFSA)		x	x
Spain	Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid			x
Sweden	Arbitration Institute of the Stockholm Chamber of Commerce (SCC)		x	x
Switzerland	Swiss Chambers' Arbitration Institution (SCAI)			x
	Swiss Arbitration Association	x		x
Thailand	Thailand Arbitration Center (THAC)	x	x	x
Ukraine	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry		x	x
United Arab Emirates	DIFC-LCIA Arbitration Centre		x	x
	Dubai International Arbitration Centre (DIAC)			x
United Kingdom of Great Britain and Northern Ireland	London Court of International Arbitration (LCIA)		x	x
United States of America	International Centre for Settlement of Investment Disputes (ICSID)		x	x
	International Centre for Dispute Resolution (AAA-ICDR)			x

B. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)

17. The following table presents a non-exhaustive list of investment treaties concluded after 1 April 2014 where the Rules on Transparency, or provisions modelled on the Rules on Transparency, are applicable in some instances of investor-State dispute resolution. The list is based on the database of international investment agreements maintained by the United Nations Conference on Trade and Development (UNCTAD).[28]

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Japan-Ukraine BIT Agreement between Japan and Ukraine for the Promotion and Protection of Investment	5 February 2015		Article 18.4(c)
Japan-Uruguay BIT Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment	26 January 2015		Article 21.3(c)

[28] International Investment Agreements Navigator, available from http://investmentpolicyhub.unctad.org/IIA.

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Canada-Côte d'Ivoire BIT Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement	30 November 2014		Article 23.1(c) Articles 30 and 31*
Canada-Mali BIT Agreement between Canada and Mali for the Promotion and Protection of Investments	28 November 2014		Article 23.1(c) Articles 30 and 31*
Canada-Senegal BIT Agreement between Canada and the Republic of Senegal for the Promotion and Protection of Investments	27 November 2014		Article 24.1(c) Articles 31 and 32*
Japan-Kazakhstan BIT Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment	23 October 2014		Article 17.4(c)
Canada-Republic of Korea FTA Free Trade Agreement between Canada and the Republic of Korea	22 September 2014	1 January 2015	Article 8.23:1(c) Articles 8.35 and 8.36*
Canada-Serbia BIT Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments	1 September 2014		Article 24.1(c) Articles 31 and 32*
Colombia-Turkey BIT Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments	28 July 2014		Article 12.6(b)
Colombia-France BIT Acuerdo entre el Gobierno de la República de Colombia y el Gobierno de la República Francesa sobre el fomento y protección recíprocos de inversiones	10 July 2014		Article 15.4(b) Article 15.12
Egypt-Mauritius BIT Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments	25 June 2014		Article 10.4
Canada-Nigeria BIT Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments	6 May 2014		Article 24.1(c) Articles 31 and 32*
Korea-Australia FTA Free Trade Agreement between the Government of the Republic of Korea and the Government of Australia	8 April 2014	12 December 2014	Article 11.16:(3)(c) Article 11.21*

* Specific treaty provision on transparency.

Annex

List of indicators relevant in the assessment of the state of commercial law framework in a particular country

1. The legal framework provides for the recognition and enforcement of property rights and legal relationships.

2. Local commercial law framework is compliant with internationally accepted commercial law standards:

(a) Local laws regulating commercial relations are enacted on the basis of internationally accepted commercial law standards.

3. Local capacity to implement sound commercial law reforms is continually built:

(a) Training courses on commercial law matters for government officials are held regularly [but at least twice a year];

(b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (e.g. ministry or other state agency) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(c) The number of rule-formulating activities of regional and international bodies on commercial law issues attended by local experts is steadily increasing;

(d) Local expertise on commercial law issues is centralized, readily available and easily deployed when necessary (e.g. for coordinating State's position in rule-formulating activities of regional and international bodies on commercial law issues and for identifying and following up on local needs in commercial law reforms at the local, regional and international levels);

(e) Local needs in commercial law reforms are assessed on a regular basis, including within the development assistance framework.

4. Capacity of local judges, arbitrators and other legal practitioners to understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgments and awards is adequate:

(a) Continuous learning courses for judges are held regularly [but at least twice a year] and their curricula include courses on uniform interpretation and application of internationally accepted commercial law standards;

(b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, court affiliation (e.g. court of first instance, appeal court, state or federal or supreme court) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(c) The number of local judges participating in the international judicial colloquia and other international and regional judicial training is steadily increasing;

(d) A mechanism for collecting, analysing, monitoring and publicizing national case law relating to internationally accepted commercial law standards is in place;

(e) A number of reported cases on commercial law issues referencing as appropriate internationally accepted commercial law standards is steadily increasing.

5. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment are easily accessible, affordable, efficient and effective:

(a) Alternative mechanisms for resolution of commercial disputes (commercial arbitration, mediation and conciliation) are available as an option to seek adjudication of commercial disputes in a neutral forum;

(b) Those mechanisms function on the basis of internationally accepted standards;

(c) Mechanisms to monitor speed and effectiveness of court decisions and their enforcement as well as enforcement of arbitral awards are in place.

6. People are educated on international commercial law issues, basic rights and obligations arising from commercial relations and employment opportunities linked thereto:

(a) Subjects of commercial law are included in curricula of technical schools, universities and vocational training courses;

(b) Local courses for members of academia designed to facilitate developing local legal doctrine on commercial law issues in line with internationally prevailing ones are held regularly [but at least twice a year];

(c) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (universities and other academic institutions) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

(d) The number of local law students, disaggregated by gender, income and other relevant criteria, participating in local, regional and international moot competition on commercial law matters is steadily increasing.

7. Effective mechanisms for legal empowerment on commercial matters are in place:

(a) Internationally accepted commercial law standards are translated into local languages and the translation is made readily available to the public;

(b) The use of readily available authoritative sources of information on international commercial law matters, including tools designed to facilitate understanding, implementation and uniform interpretation and application of internationally accepted commercial law standards, is widely promoted;

(c) There are institutions that support economic activity, such as chambers of commerce, bar associations, commercial arbitration and conciliation centres, and they are evenly distributed throughout the country.

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Some outcome and output indicators, such as those below, although not commercial law specific, influence the effectiveness of the commercial law framework:

8. Laws, regulations and other legal texts with any amendments thereto as well as judicial decisions and administrative rulings of general application or precedent value are:

(a) Easily understood;

(b) Capable of uniform interpretation and application; and

(c) Made promptly accessible to the public.

9. The authoritative source of legal texts and other government information is widely publicised and systematically maintained;

10. Institutions and work force therein are well-structured, financed and trained;

11. There are mechanisms to monitor and oversight actions and decisions of public authorities."

XI. COORDINATION AND COOPERATION

Note by the Secretariat on coordination activities

(A/CN.9/838)

[Original: English]

Contents

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 report, prepared in response to resolution 34/142 and in accordance with UNCITRAL's mandate,[3] provides information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL secretariat has participated, principally working groups, expert groups and plenary meetings. The purpose of that participation has been to ensure coordination of the related activities of the different organizations, share information and expertise and avoid duplication of work and the resultant work products.

4. The Commission may wish to note the increasing involvement of the Secretariat in initiatives of other organizations. This is a recurrent pattern in recent years, consistent with the increase in the Secretariat's technical assistance activities,[4] and which is expected to continue and even increase in future.

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[1] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), paras. 93-101.

[2] Ibid., para. 100.

[3] See General Assembly Resolution 2205 (XXI), sect. II, para. 8.

[4] See A/CN.9/775.

II. Coordination activities

A. The International Institute for the Unification of Private Law and the Hague Conference on Private International Law

International Institute for the Unification of Private Law (Unidroit)

5. The Secretariat participated in Unidroit work in the area of contract law, reviewing work in the area of contract farming and participating as an observer in the first meeting of the Working Group on Long-Term Contracts (Rome, 19-23 January 2015), which was established for the purpose of formulating proposals for possible amendments and additions to the black-letter rules and comments of the Unidroit Principles of International Commercial Contracts 2010.

Hague Conference on Private International Law (HccH)

6. The Secretariat continued to participate as an observer in meetings of the HccH Working Group on Choice of Law in International Contracts (teleconference, 17 September 2014). The Working Group finalized its work on this non-binding instrument, and the Hague Principles on Choice of Law in International Commercial Contracts were approved on 19 March 2015. It is expected that HccH will submit the Principles to the Commission for consideration for endorsement at its 48th session.

Joint activities with Unidroit and HCCH

7. The UNCITRAL secretariat hosted the tripartite coordination meeting with Unidroit and HccH, at which current work of the three organizations and potential areas for cooperation were discussed (Vienna, 30 April 2015). Attention was given to areas of mutual interest including The Hague Principles on Choice of Law in International Commercial Contracts (see para. 6 above), the Fourth Protocol to the Cape Town Convention on Matters Specific to the Agricultural, Construction and Mining Equipment (see para. 34 below) and security interests in non-intermediated securities (dealt with in the UNCITRAL Model Law on Secured Transactions currently being drafted by UNCITRAL Working Group VI). Cooperation between regional centres in the Asia-Pacific region, and in provision of judicial training at regional level was also discussed.

B. Other organizations

8. The Secretariat undertook other coordination activities with various international organizations. Most of such activities included provision of comments on documents drafted by those organizations, and participation in various meetings and conferences with the purpose of briefing about the work of UNCITRAL or to provide an UNCITRAL perspective on the matters at stake.

1. General

9. The Secretariat visited the Swiss Institute of Comparative Law (SICL) to discuss possibilities for joint cooperation, including in the areas of research and business & human rights (Lausanne, Switzerland, 8 May 2014).

10. The Secretariat remained actively involved in the Inter-Agency Cluster on Trade and Productive Capacity.[1] In addition to participating in meetings (via teleconference) and providing inputs to various documents, the Secretariat also attended a face to face meeting to discuss the possible establishment of a Global Multi Donor Trust Fund on Trade and Productive Capacity (Geneva, Switzerland, 9 September 2014).

11. The Global Forum on Law, Justice and Development (GFLJD) is a permanent global forum, established at the initiative of the World Bank, that aims to exchange and disseminate innovative legal solutions for development. It is intended to spur both

[1] See A/CN.9/725.

South-South and North-South collaboration. The activities of the Forum are multidisciplinary and address economic, legal and technical dimension of the targeted issues. One of such activities is the Law, Justice and Development Week (see para. 31 below). The GFLJD is supported by an online platform that is instrumental to disseminate knowledge and is freely accessible by the general public. The Forum is organized around thematic working groups, which, among others, focus on issues such as justice and rule of law reform; law and the economy; governance and anticorruption. The UNCITRAL secretariat was appointed as co-leader of the Law and Economy Working Group, with effect from September 2014.

12. As part of the New York State Bar Association International Section's Seasonal Meeting, on "Rebuilding the Transatlantic Marketplace: Austria and Central Europe as Catalysts for Entrepreneurship and Innovation", the Secretariat co-hosted an UNCITRAL-day which provided an opportunity to engage with members of the Association on topics of interest to UNCITRAL. Structured in a series of round tables, the UNCITRAL day focused, inter alia, on cross-border insolvency, the UNCITRAL transparency rules in Investor-State Arbitration, security interests, e-commerce and international sale of goods (Vienna, 16 October 2014).

13. The Secretariat attended the annual meeting of the Advisory Committee on Private International Law (Washington, D.C., 2-4 November 2014).

14. The Secretariat met with the Municipality of The Hague, the Netherlands Ministry of Foreign Affairs, The Hague Conference on Private International Law and the Hague Institute for Global Justice to discuss future collaboration in view of the UNCITRAL Secretariat projected presence in The Hague (The Hague, The Netherlands, 16-17 December 2014).

Asia-Pacific Economic Cooperation (APEC)

15. The Secretariat participated in the APEC Economic Committee and the "APEC Ease of Doing Business (EoDB) 2014 Stocktaking Workshop" held during the Third Senior Officials Meeting (SOM3) of APEC (Beijing, 13-17 August 2014). The EoDB Stocktaking Workshop provided the opportunity for the Secretariat to highlight its cooperation with the Korean Ministry of Justice on the APEC EoDB project on enforcing contracts and also to present on the close relationship between UNCITRAL texts and the APEC EoDB project in general (see also A/CN.9/837). On 8 November 2014, the APEC Ministers in their Joint Ministerial Statement, welcomed the joint efforts of the Economic Committee and UNCITRAL to build awareness of private international law instruments to facilitate cross-border trade and investment, enhance ease of doing business, and foster effective enforcement of contracts and efficient settlement of business disputes.

16. The Secretariat also participated in the APEC Economic Committee and the "APEC Workshop on UNCITRAL Instruments and the EoDB initiative" during the First Senior Officials Meeting (SOM1) of APEC (Clark, The Philippines, 2-4 February 2015). The full-day workshop was dedicated to assessing the relevance of UNCITRAL texts and the EoDB initiative and to share implementation experiences in the areas of obtaining credit, enforcing contracts and trading across borders. It also provided the opportunity for the Secretariat to present ongoing work at UNCITRAL and to discuss how UNCITRAL texts could be incorporated into APEC's EoDB initiative. The APEC Economic Committee decided to establish a new APEC Economic Committee Friends of the Chair (FotC) Group on Strengthening Economic and Legal Infrastructure ("SELI") and the Secretariat hopes to contribute to the Group's work.

Rule of Law

17. The UNCITRAL secretariat undertook or facilitated several coordination activities on the rule of law in those areas of work of the United Nations and other entities that are of general relevance to UNCITRAL. The activities listed below are

in addition to those already reported at the forty-seventh session of the Commission, in 2014.[2]

18. The UNCITRAL secretariat contributed to an addendum to the 2013 report of the Secretary-General on strengthening and coordinating the United Nations rule of law activities (A/68/213/Add.1) that identified some of the most important linkages between the rule of law and the three pillars upon which the United Nations is built: peace and security, human rights and development. The report highlighted the role of UNCITRAL and its standards in that context and the Secretary-General recommended that the General Assembly may wish to consider benefiting from a closer interaction with some of the existing subsidiary bodies, such as UNCITRAL, in developing those linkages.[3] The UNCITRAL secretariat also contributed to the preparation of the 2014 and 2015 annual reports of the Secretary-General to the General Assembly on strengthening and coordinating United Nations rule of law activities (A/69/181; a symbol number for the 2015 report was not known at the time of the submission of this document).

19. The UNCITRAL secretariat continued to provide comments on the draft guiding principles on business and the rule of law, currently under consideration by the United Nations Secretariat. It also continued efforts towards advancing the work on a draft guidance note of the Secretary-General on the United Nations approach to promotion of the rule of law in commercial relations. The latter was brought to the attention of the Commission at its forty-sixth and forty-seventh sessions, in 2013 and 2014.[4] As the Commission was informed in 2014, the draft guidance note was presented at the expert level meeting of the Rule of Law Coordination and Resource Group of the United Nations on 20 December 2013. The Commission was informed at that time that the text was undergoing final approval and was expected eventually to be circulated across the United Nations, including United Nations country offices.[5] In view of the continuation of discussion in other fora around the concept of the rule of law and its possible reflection in the post-2015 development agenda to be considered by the General Assembly, it was suggested that the goals expressed in the draft guidance note might be more expeditiously pursued through another route. At the current session, the Commission is invited to consider under a different agenda item whether, and if so how, the work on the draft guidance note should be progressed.

Post-2015 development agenda

20. It may be recalled that, at its forty-sixth and forty-seventh sessions, in 2013 and 2014, the Commission learned about initiatives across the United Nations system to formulate sustainable development goals and a post-2015 international development agenda.[6] At that time, the Commission noted the relevance of UNCITRAL work to these initiatives and requested its Bureau and its Secretariat to take appropriate steps to ensure that the areas of work of UNCITRAL and the role of UNCITRAL in the promotion of the rule of law and sustainable development were not overlooked.[7]

21. Pursuant to those requests, efforts were made to ensure that the message of UNCITRAL was conveyed to the States negotiating the post-2015 development agenda. For such purpose, two events were organized in conjunction with sessions of UNCITRAL:

(a) A side event on “UNCITRAL standards for transparency, accountability and good governance” (New York, United States of America, 17 July 2014) that took

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[2] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 220-233.

[3] A/68/213/Add.1, paras. 71, 72 and 98.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 273; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 222 and 224-227.

[5] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 222.

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 274-275; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 220-233.

[7] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 275; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 228.

place in the margins of the forty-seventh session of UNCITRAL and the thirteenth (last) session of the Open Working Group on Sustainable Development Goals (New York, United States, 14-18 July 2014). Invited representatives of States and international organizations highlighted the relevance of standards elaborated by UNCITRAL to issues of good governance being discussed in the context of the post-2015 development agenda, including in the Open Working Group;[8] and

(b) A briefing on "Means of implementation: harmonizing and modernizing the law of international trade" (New York, United States, 5 February 2015) that took place in the margins of the sixty-second session of UNCITRAL Working Group II (Arbitration and Conciliation) (New York, United States, 2-6 February 2015) and before the General Assembly's High-level Thematic Debate on Means of Implementation for a Transformative Post-2015 Development Agenda (New York, United States, 9-10 February 2015). The briefing was organized by the Chair of UNCITRAL at its forty-seventh session and sponsored by States members of the Bureau of UNCITRAL at its forty-seventh session: Croatia, El Salvador, Italy, Mauritius and the Republic of Korea. Invited speakers presented indicators relevant to harmonizing and modernizing the law of international trade as an essential means of implementation of the post-2015 development agenda, including sustainable development financing.[9] On both occasions, the importance of duly taking into account the contribution of modern and harmonized commercial law to sustainable development and the need to continuously build adequate capacity of States to implement sound commercial law reforms were highlighted.

22. In addition, the Chair of UNCITRAL at its forty-seventh session delivered a statement on "Improving Cross-Border Trade and Investment: Models of Cooperation among Stakeholders in Theory and Practice" (Washington, D.C., 20 October 2014) during the World Bank's Law, Justice and Development Week 2014 (see also paras. 31 below and 11 above), and another statement (New York, United States, 10 February 2015) during UNCTAD's side event on "Making the Sustainable Development Goals Work: Harnessing Trade, Investment, Finance and Technology for Sustainable Development". On both occasions, the UNCITRAL Chair explained ways for positioning UNCITRAL in the post-2015 development agenda.

23. At the Secretariat level, the UNCITRAL secretariat has been included as member of the United Nations Technical Support Team, the interagency coordination mechanism for support to Member States on the post-2015 negotiation process of the General Assembly. In that capacity, the UNCITRAL secretariat was able to contribute to the formulation of indicators to the goals and targets of the post-2015 development agenda proposed in the report of the Open Working Group on Sustainable Development Goals (A/68/970 and Corr.1), highlighting in particular that:

(a) In indicators to goals and targets related to good governance, rule of law and access to justice, issues of civil justice, including contract enforcement, availability of arbitration and alternative dispute resolution mechanisms for resolution of commercial disputes, and judicial training to address the capacity of local judges to properly interpret and apply laws, should not be overlooked. Indicators should focus not only on concerns of individuals but also capture legitimate interests of business entities in good governance, including those of micro, small and medium-sized enterprises in ease of incorporation, receiving licenses and other approvals and other aspects of doing business in a particular society;

(b) In indicators to targets aimed at increasing representation of developing countries in institutions of global governance, including UNCITRAL, the need to capture not only quantitative but also qualitative aspects of increased participation of all States in institutions of global governance and building required local capacity to that end, should not be overlooked;

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[8] Materials of the side event are available at www.uncitral.org/uncitral/en/data/whats_new/2014_07_uncitral-standards-for-transparency-accountability-and-good-governance.html.

[9] Materials of the briefing are available at www.uncitral.org/pdf/english/whats_new/2015_02/5_February_2015_briefing_consolidated_statements.pdf.

(c) In indicators to targets referring to non-discriminatory laws for sustainable development, compliance with internationally accepted standards should be factored as an essential contributor to the quality of the legal framework and its implementation.

24. Finally, efforts were made to increase cooperation with academic institutions through the Academic Council on the United Nations System (ACUNS)[10] so as to stimulate UNCITRAL-related research and publications, including on relevance of UNCITRAL to the implementation of the post-2015 development agenda. In this context, the Secretariat made a presentation on "The importance of a solid commercial legal framework for sustainable development" at ACUNS Vienna 2015 Annual Conference, which was later published in the proceedings of the conference (Vienna, 15 January 2015).

2. Micro, small and medium-sized enterprises (MSMEs)

25. In order to assist the deliberations of Working Group I (under its current mandate), the Secretariat established or strengthened links with other organizations active in the promotion of MSMEs. In this context:

(a) The Secretariat attended as an observer the 11th annual conference of the Corporate Registers Forum (Abu Dhabi, 8-12 March 2015) at which the state of the art and current issues of business registration practices around the world were discussed. Among others, the Conference focused on the role of business registration in economic growth; initiatives to streamline business registration; and the use of information and communication technology or web-based solutions in business registration. All these topics are particularly relevant to Working Group I's discussions on business registration. The Secretariat was also given the opportunity to deliver a presentation on the current mandate of the Working Group.

(b) The Secretariat held meetings with the World Bank business registration experts to become apprised of the Bank's experience in this area with a view to preparing a draft legislative text on business registration (see A/CN.9/825, para. 43) (Washington, DC., 9 April 2015).

3. Procurement

26. In accordance with requests of the Commission and Working Group I (under its former mandate on Public Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the UNCITRAL Model Law on Public Procurement (2011) and its accompanying Guide to Enactment (2012). The aims of such cooperation are to ensure that reforming governments and organizations are informed of the policy considerations underlying those texts, so as to promote a thorough understanding and appropriate use of the Model Law, at both regional and national levels. The Secretariat is taking a regional approach to this cooperation, and activities with the multilateral development banks in several regions, focusing on good governance and anti-corruption (in which procurement reform plays a pivotal role), are envisaged.

27. To this end, the Secretariat participated, among others, in the following activities:

(a) The work of the World Bank's International Advisory Group on Procurement, which advises the World Bank on its Procurement Policy Review, including participation in a meeting held in Cairo, to review and comment on the proposed Phase II of the reforms (Cairo, 15-16 February 2015);

(b) The development of a World Bank system for benchmarking public procurement, including virtual participation in a relevant meeting (Washington, D.C., 14 March 2015);

[10] See: http://acuns.org/.

(c) The work of the team of specialists in Public-Private Partnerships (PPPs) of the United Nations Economic Commission for Europe (UNECE), which meets and reviews policy issues in PPPs, including on the Role of PPPs in financing the post-2015 United Nations Development Agenda;

(d) The work of the Meeting of Leading Practitioners on Public Procurement of the Organization for Economic Co-operation and Development (OECD), focussing on designing procurement performance indicators and green public procurement; and

(e) The work of the Sustainable Public Procurement Initiative Network established by the United Nations Environment Programme (UNEP), including serving on its working groups on developing principles for sustainable public procurement, addressing legal barriers, and promoting collaboration between international organizations.

4. Dispute settlement

28. The Secretariat activities in the area of international commercial arbitration and conciliation included:

(a) Participation in the United Nations Conference on Trade and Development (UNCTAD) World Investment Forum 2014 with regard to transparency and international investment agreements (Geneva, Switzerland, 15-16 October 2014). UNCITRAL regularly takes part in the World Investment Forum as part of its ongoing cooperation with UNCTAD in the field of International Investment Arbitration;

(b) Cooperation with the International Bar Association (IBA) with regard to their annual conference in Tokyo (October 2014) and the fourth Asia Pacific Regional Conference in Singapore (March 2015);

(c) Coordination with OECD with respect to the Investment Security in the Mediterranean (ISMED) Initiative, which supports investment policy reform in the Middle East and North Africa (see A/CN.9/809, para. 15). This included attendance at the conference “Defining a Way Forward for Infrastructure Investment in the Middle-East and North Africa (MENA)” (Paris, 4-5 December 2014) and co-organization of the International Conference for Euro-Mediterranean Community of International Arbitration (see A/CN.9/837);

(d) Cooperation with the International Centre for Trade and Sustainable Development (ICTSD), and participation in the E15 Initiative Task Force on Investment Policy, which also included attendance at the following activities: (i) the ICTSD Expert Group Scoping Meeting on Investment at the World Economic Forum (New York, United States, 10 December 2014, via teleconference); (ii) the coordination meeting on international investment agreement reforms (Vienna, 22 January 2015, via teleconference); and (iii) the First Task Force Workshop on Investment Policy (Geneva, Switzerland, 23-24 March 2015);

(e) Coordination with UNCTAD with respect to the publication of the UNCTAD International Investment Arbitration (IIA) Issues Note and participation in the expert group meeting on investor-State dispute settlement (ISDS) reforms to provide information on the work of UNCITRAL in the field of transparency in treaty-based investor-State arbitration (Geneva, Switzerland, 27 February 2015);

(f) Participation in the OECD Conference on Investment Treaties: Policy Goals and Public Support (Paris, 16 March 2015);

(g) Coordination with the International Centre for Settlement of Investment Disputes (ICSID) on matters related to international investment arbitration reforms;

(h) Coordination with the Energy Charter Treaty (ECT) secretariat and participation in their expert groups, including the group on mediation;

(i) Coordination with the German cooperation organization, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) with respect to arbitration projects in the Balkan region;

(j) Coordination with the International Chamber of Commerce (ICC) with regard to possible cooperation on joint conferences, training, and use of resources in relation to instruments on international arbitration;

(k) Coordination with the European Union and the OPEC Fund for International Development (OFID) with respect to the financing of the transparency registry;

(l) Coordination with arbitration institutions with respect to use of the UNCITRAL Arbitration Rules;

(m) Coordination with arbitration institutions and organizations (including the International Council for Commercial Arbitration (ICCA) and the International Federation of Commercial Arbitration Institutions (IFCAI)) regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings;

(n) Coordination with organizations active in the field of mediation (including the International Mediation Institute (IMI)) for the preparation of possible work in the field of enforcement of settlement agreements; and

(o) Coordination with various institutions including OECD, ICSID, The Permanent Court of Arbitration (PCA), The Arbitration Institute of the Stockholm Chamber of Commerce, the ECT secretariat, the International Arbitration Institute (IAI), and the Geneva Centre for International Dispute Settlement (CIDS), in relation to possible future work in the field of concurrent proceedings.

5. Electronic commerce

29. The Secretariat carried out coordination activities with international and regional organizations involved in the formulation of legal standards in the field of electronic commerce to ensure their compatibility with UNCITRAL texts and principles. Among others, ongoing coordination with the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP), UNCTAD and APEC is to be noted.

30. In the context of UN/ESCAP preparing a Regional Agreement for the Facilitation of Cross-border Paperless Trade, the Secretariat participated as an observer in the First Meeting of the Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation aiming to contribute to the preparation of such regional agreement (Bangkok, 31 March-4 April 2015).

6. Insolvency

31. The Secretariat participated in a session of the World Bank's Insolvency Law Task Force, held in conjunction with the World Bank's Law, Justice and Development Week to consider updating the Insolvency and Creditor/Debtor Regimes (ICR) Standard (comprising the World Bank Principles and recommendations of the UNCITRAL Legislative Guide on Insolvency Law) (Washington D.C., 23-24 October 2014), specifically the Principles relating to the following:

(a) Secured transactions: an update on the work regarding the Principles relating to secured transactions was provided, with a list of questions and a summary of proposed changes to those Principles to be sent out to Task Force members shortly;

(b) Directors' obligations in the period approaching insolvency: the proposed revision of Principle B2 concerning director's and officers' accountability, to align it with the recent recommendations contained in Part four of the UNCITRAL Legislative Guide on Insolvency Law, was discussed and a number of suggestions made. A further draft was to be prepared to reflect those suggestions and approval sought in accordance with World Bank processes; and

(c) Insolvency treatment of financial contracts: a paper on the treatment of financial contracts in insolvency was circulated and possible revision of the World Bank Principle C10 considered. It was agreed that the Principle should be revised. With the assistance of experts, the World Bank was to prepare a redrafted version of

the Principle and submit it to Task Force members for comment, following which approval of the revised Principle could be sought at a subsequent Task Force meeting.

32. The Secretariat co-organized the 11th joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium (San Francisco, United States, 21-22 March 2015). Over 78 judges and government officials attended from over 41 States, representing a broad range of practical experience and perspectives, particularly with respect to cross-border insolvency, from diverse legal systems and legal traditions. As in previous years, a number of participants were first time attendees. The report of the Colloquium is available on the UNCITRAL website (www.uncitral.org/uncitral/en/commission/colloquia.html).

7. Security interests

33. Coordination with relevant organizations was pursued to ensure that States are offered comprehensive and consistent guidance in the area of secured transactions law.

34. Specific activities of the Secretariat included:

(a) Coordination with the New York State Bar Association for its endorsement of the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) (the "Assignment Convention") (Vienna, 16 October 2014);

(b) Coordination with the ICC for its endorsement of the Assignment Convention (October-November 2014);

(c) Coordination with the International Factors Group for its endorsement of the Assignment Convention (October-November 2014);

(d) Coordination with Unidroit to ensure that work of the Unidroit Mining, Agriculture and Construction (MAC) Protocol Study Group does not overlap or conflict with the security interests texts prepared by UNCITRAL (Rome, 15-17 December 2014);

(e) Coordination with the International Financial Corporation in providing law reform assistance to States in line with the recommendations of the UNCITRAL Legislative Guide on Secured Transactions (Colombo, Sri Lanka, 18-19 September 2014; Rabat, 24-25 September 2014; and Port of Spain, 2-6 February 2015);

(f) Coordination with the work of the Organization of American States in local capacity-building with respect to secured transactions (Kingston, 10-12 February 2015);

(g) Coordination with the World Bank to prepare a revised version of the joint UNCITRAL-World Bank Standard on Insolvency and Creditor Rights to include the key recommendations of the UNCITRAL Legislative Guide on Secured Transactions (ongoing); and

(h) Coordination with the European Commission to ensure that a coordinated approach is adopted with respect to the law applicable to third-party effects of assignments of receivables (ongoing).

World Bank Insolvency and Creditor Rights Standard (ICR Standard)

35. At its forty-seventh session, in 2014, the Commission "noted with appreciation the efforts of the Secretariat to coordinate with the World Bank in preparing a revised version of the World Bank Insolvency and Creditor Rights Standard (the "ICR Standard") on the basis of the World Bank Principles for Effective Insolvency & Creditor Rights Systems (the "Principles") revised to incorporate the key recommendations of the Secured Transactions Guide, and to make reference to the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property ….[11] It was widely felt that such coordination effort was important and should continue in an expeditious manner. Thus, the Commission

[11] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 185.

renewed its mandate to the Secretariat to continue to coordinate with the World Bank and to finalize a revised version of the ICR Standard that would be consistent with relevant UNCITRAL texts".[12]

36. At its meetings in October 2014 and May 2015, the World Bank Task Force was asked to consider only the World Bank Principles dealing with secured transactions. The status of the revised ICR Standard that was jointly prepared by the World Bank and the Secretariat, considered by the Task Force at its meeting in October 2013 and revised thereafter in accordance with the above-mentioned mandate remains unclear. The Commission may thus wish to consider this matter and confirm or revise the mandate given to Secretariat to coordinate with the World Bank so as to include in the revised ICR Standard the key recommendations of the Secured Transactions Guide and references to the other UNCITRAL texts on secured transactions. In this connection, the Commission may wish to take into account the need for both duplication of effort and divergence in the texts to be avoided, with due respect for the different mandates of the Commission and the World Bank.[13]

8. Commercial Fraud

Further to the request of the Commission (A/63/17, para. 347; A/64/17, para. 354, and A/68/17, para. 312, in relation to commercial fraud, the Secretariat continued to coordinate with the United Nations Office on Drugs and Crime (UNODC) in its work on economic crime and identity fraud. In particular, the Secretariat remains a member of UNODC's core group of experts on identity-related crime, which was formed to bring together on a regular basis representatives from governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. Work planned by the UNODC core group of experts on the development of model legislation on identity-related crime did not proceed due to a lack of extrabudgetary resources, however the Secretariat will continue to participate in the core group of experts once its work proceeds. The Commission may also wish to note that UNODC also plans to develop, again subject to the availability of extrabudgetary funds, a web-based repository of information on identity-related crime, as well as a comprehensive package of training tools (see E/CN.15/2014/17, paras. 72 to 75 for more details).

[12] Ibid., para. 187.
[13] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 174.

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Summary record of the 998th meeting
Held at the Vienna International Centre, Vienna, on Monday, 29 June 2015, at 10 a.m.

[A/CN.9/SR.998]

Temporary Chair: Mr. Sorieul (Secretary of the Commission)
Chair: Mr. Reyes Villamizar (Colombia)
Later: Mr. Schneider (Vice-Chair of the Commission, Chair of Working Group II) (Switzerland)

The meeting was called to order at 10.15 a.m.

Opening of the session

1. **The Temporary Chair** opened the forty-eighth session of the United Nations Commission on International Trade Law.

Election of officers

2. **The Temporary Chair** said that it was the turn of the Group of Latin American and Caribbean States to nominate a Chair.

3. **Mr. Cervera Martínez** (Mexico), speaking on behalf of the Group of Latin American and Caribbean States, said that the Group wished to nominate Mr. Reyes Villamizar (Colombia) for the office of Chair.

4. *Mr. Reyes Villamizar (Colombia) was elected Chair by acclamation*.

5. *Mr. Reyes Villamizar (Colombia) took the Chair*.

6. **The Chair** said that his election was a great honour for Colombia, which had benefited greatly from, and participated actively in, the work of the Commission. He looked forward to working closely with the Commission in the coming year.

7. **Mr. Coppola** (Italy), speaking on behalf of the Group of Western European and Other States, said that the Group wished to nominate Mr. Michael Schneider (Switzerland) for the office of Vice-Chair of the Commission.

8. *Mr. Schneider (Switzerland) was elected Vice-Chair of the Commission by acclamation*.

9. **The Chair** said that the Commission would elect the other members of the Bureau once it had taken a decision on its work programme, under agenda item 18.

Adoption of the agenda (A/CN.9/824)

10. **Mr. Schnabel** (United States of America) sought confirmation that the Commission's consideration of items 6, 7, 8 and 9 at the end of the first week of the session would focus only on the presentation of the reports of Working Groups I, III, IV, V, whereas decisions regarding the future work to be undertaken by those Working Groups would be taken only after the Commission had discussed its work programme during the second week of the session.

11. **The Chair** confirmed that the Commission would only take note of the reports of the Working Groups and would undertake a detailed discussion of its work programme under agenda item 18 before taking any decision on its future work.

12. **Mr. Sorieul** (Secretary of the Commission) drew attention to the fact that the Commission was under increasing pressure to make the most efficient possible use of the time available, hence the way in which the Commission's schedule had been organized. It was important that the Commission begin and end its meetings punctually and work intensively.

13. **Mr. Apter** (Israel) said that it was his delegation's understanding that preliminary discussion of future work, including the proposal submitted by Israel with regard to possible future work in the area of online dispute resolution (A/CN.9/857), would take place on the Friday of the first week of the session, provided that the Commission had concluded its discussion of agenda item 4. He therefore hoped that there would be sufficient time on that day for substantive discussions with a view to using the time available as efficiently as possible and enabling the Commission to take decisions on its future work the following week. His delegation would be absent during that second week of the session, and other delegations might also face the same constraint.

14. *The agenda was adopted*.

15. *Mr. Schneider (Switzerland), Vice-Chair, Chair of Working Group II, took the Chair*.

Consideration of issues in the area of arbitration and conciliation

(a) Consideration and provisional approval of revised UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/826, 832 and 844)

16. **The Chair**, drawing attention to document A/CN.9/844, which contained the text of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings, said that the work undertaken to date to develop the draft revised Notes had been particularly difficult and had generated animated and intensive discussions in Working Group II. Governments and relevant international and non-governmental organizations had been invited to make

comments on the draft revised text and those comments were reflected in document A/CN.9/844. Comments and proposals submitted following the issuing of that document would be brought to the Commission's attention as the discussion proceeded.

17. He took it that the Commission wished to consider the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings paragraph by paragraph.

18. *It was so decided*.

Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

List of matters for possible consideration in organizing arbitral proceedings

Introduction

Purpose of the Notes (paragraphs 1 and 2)

Non-binding character of the Notes (paragraphs 3 and 4)

19. **The Chair** said that the introduction emphasized the general principles underlying the Notes, and care had been taken to ensure that the Notes contained only recommendations, rather than directives. The overall manner in which the revised Notes had been drafted highlighted the diversity in arbitration practices around the world and sought to avoid the imposition of best practices. The Notes avoided treatment of specific types of arbitration or specific situations arising in arbitration except in the context of confidentiality — which remained an important feature of commercial arbitration — in relation to investment arbitration. References to technology and means of communication had been updated to ensure that non-specific language was used, in view of the diversity of technologies available and the constant evolution of new technologies. New notes on interim measures and joinder and consolidation had been added. It was highlighted that the Notes did not impose legal requirements and were not intended to serve as arbitration rules.

Conduct of the arbitral proceedings (paragraphs 5-8)

20. **The Chair** said that the draft revised Notes emphasized the flexibility of arbitral proceedings and the importance of the autonomy of the parties in determining the rules of procedure, which should be tailored to the parties' specific wishes and needs. The Notes were also intended to strike a balance between highlighting issues that might need to be considered by the tribunal and avoiding a lengthy exchange between the tribunal and the parties on issues that ultimately proved irrelevant to the proceedings, which would unnecessarily complicate the conduct of the proceedings. He suggested that the Commission focus on issues of substance in view of time constraints, and that any minor points of drafting be pointed out to the secretariat so that they could be taken into account during the finalization of the text, bearing in mind, however, that drafting matters sometimes brought issues of substance to light.

Consultation between the arbitral tribunal and the parties for decisions on organizing arbitral proceedings (paragraphs 9-12)

21. **The Chair** said that the Working Group had considered it important to underscore that the arbitral tribunal should consult the parties with respect to the organization of the proceedings and relevant decisions and that the parties should consult the tribunal before making decisions that affected or might affect the tribunal's work. It had also emphasized that, in the event of modification by the tribunal of the procedural arrangements, the tribunal should assure itself that the parties had not come to an agreement that would be affected by a change in those arrangements.

22. **Mr. Schöfisch** (Germany) welcomed the progress made by the Working Group in drafting the revised Notes, which were highly satisfactory, and expressed the hope that if any changes were made to the revised text, they would be only minor.

Procedural meetings (paragraphs 13-16)

23. **The Chair** said that the importance of procedural meetings had been increasingly highlighted by arbitration institutions. Drawing attention to the final sentence of paragraph 13, concerning the presence of the parties at procedural meetings, he asked whether there were any situations in which the presence of the parties might not be desirable, for example, where the organization of the proceedings might be facilitated if antagonistic parties were not present at the procedural meeting or meetings.

24. **Mr. Möller** (Observer for Finland) proposed that the words "It is desirable" in that sentence be replaced with the words "It may be desirable" in order to provide for such a possibility.

25. **Mr. Dennis** (United States of America) said that his delegation would prefer the words "It is usually desirable" in view of the fact that situations in which the presence of the parties was undesirable, including where the relationship between the parties was antagonistic, were unusual.

26. **The Chair** asked whether the proposal made by the representative of the United States of America addressed the concern raised and was acceptable to the Commission.

27. *It was so agreed*.

28. **Mr. Apter** (Israel) said that paragraph 14 should reflect the possible need to adjust the procedural timetable in the event of joinder or consolidation.

29. **The Chair**, supported by Mr. Dennis (United States of America), said that such an amendment seemed unnecessary given that consolidation did not usually occur after the arbitral tribunal had been constituted and proceedings had commenced.

30. **Mr. Apter** (Israel) said that such situations could arise if the practice of the jurisdiction concerned differed from the usual practice.

31. **The Chair** said that such exceptional situations were adequately covered by paragraph 12, which provided that

decisions regarding procedural arrangements could be revisited and modified, and paragraph 14 itself, which provided for cases in which a party had not participated in procedural meetings and thus for changes resulting from the participation of a new party in the arbitration.

32. **Mr. Dennis** (United States of America) said that, in paragraph 14, the word "possibly" in "the arbitral tribunal should nevertheless provide, possibly in the procedural timetable, the non-participating party with a sufficient opportunity to present its case in the arbitral proceedings" raised concern because, if a timetable had been established, the tribunal would normally adjust the timetable to provide for such opportunity. It was his delegation's understanding that the paragraph was intended to reflect the possibility that there may not be a timetable. He therefore proposed, in order to convey that intention more accurately, that the words "possibly in the procedural timetable" be replaced with the words "including in any procedural timetable".

33. **The Chair** said that that concern might best be addressed by removing the words ", possibly in the procedural timetable,", since that reference to the procedural timetable possibly diminished the general application of the provision. A second sentence could then be added to the effect that if a procedural timetable had been established, that timetable might need to be adjusted to provide the non-participating party with an opportunity to present its case.

34. **Mr. Dennis** (United States of America) said that, while his delegation supported the proposed deletion, the proposed additional sentence might not be appropriate, since it was usually the case that at a procedural meeting no timetable was yet in place; a procedural meeting usually led to the adoption of a timetable.

35. **The Chair** pointed out that there might be several procedural meetings at which a party was not present.

36. **Mr. Malhotra** (India), endorsing the Chair's proposal to remove the reference to the procedural timetable, proposed that the words "from the stage of its participation" be added at the end of the sentence in order to ensure that the opportunity given to the non-participating party to present its case was sufficient.

37. **The Chair** said that there may be cases in which a party was joined to an arbitration but subsequently failed to participate in the procedural meeting. The provision might therefore be too restrictive if the opportunity provided to the new party was only from the stage of its participation. The main issue at hand was whether the reference to the procedural timetable should be retained.

38. **Ms. Yasseen** (Observer for the Swiss Arbitration Association), expressing concern that the provision did not ensure due process, proposed that the words "a sufficient opportunity" be replaced with the words "equal opportunity" or similar wording to convey the idea that all parties should be given an equal opportunity to present their case, even if they did not participate in procedural meetings.

39. **The Chair** said that the introduction of such a substantive amendment was undesirable since the paragraph as drafted was sufficient and offered the arbitral tribunal flexibility. The availability to all parties of equal time depended very much on the circumstances.

40. **Mr. Zhang** (Observer for the China International Economic and Trade Arbitration Commission), expressing support for the Chair's proposal, said he agreed that it would be undesirable to make major substantive changes to the provision.

41. **Mr. Lee** (Republic of Korea) said that, while his delegation also supported the Chair's proposal, it should be borne in mind that the entire procedural timetable could be subject to change under the circumstances provided for.

42. **The Chair** said he took it that the Commission wished to accept his proposal.

43. *It was so decided*.

44. **The Chair**, drawing attention to paragraph 15, proposed that the word "also" be inserted before the words "be made orally" in the second sentence in order to clarify that that sentence referred to further forms that decisions made at procedural meetings might take.

45. *It was so agreed.*

46. **The Chair**, drawing attention to paragraph 16, recalled that the Working Group had considered that that draft provision should point out at least some of the respective advantages of in-person meetings and the use of remote means of communication. He took it that the Commission wished the secretariat to modify the paragraph accordingly.

47. *It was so decided*.

Annotations

Note 1. Set of arbitration rules

(a) Selection of a set of arbitration rules (paragraphs 17 and 18)

48. **Ms. Jamschon Mac Garry** (Argentina) said that while she had no comments as yet on the annotations, she wondered why the Vice-Chair had been selected to chair the discussions on agenda item 4 (a) rather than the Chair, who represented her country's region.

49. **The Chair** said that the Commission was simply following its usual practice of designating Vice-Chairs to preside over meetings that focused on specific subjects in the discussion of which they had been closely involved.

50. **Mr. Sorieul** (Secretary of the Commission) confirmed that it was the practice for the Chair of a Working Group to conduct deliberations when those deliberations were focused on the results of the work of that particular Working Group. The Vice-Chair was selected according to the subject matter of the discussion. The Chair of the session would probably preside over the Committee of the Whole to discuss agenda item 5.

51. **Mr. Apter** (Israel) said that the fourth sentence of paragraph 17 placed too much emphasis on the prevalence

of the set of arbitration rules selected by the parties over the applicable domestic arbitration law rather than on the fact that the arbitration rules would govern the arbitration subject to the mandatory provisions of that law. As an UNCITRAL document and as a United Nations document, the Notes should use softer language. He therefore proposed that the words "these usually prevail over the non-mandatory provisions of the applicable arbitration law" be replaced with the words "these will usually govern the entirety of the process, subject to the mandatory provisions of the applicable arbitration law".

52. **The Chair** said that one of the reasons for highlighting the prevalence of the arbitration rules over the non-mandatory provisions of domestic law was to provide for situations where the domestic arbitration law was antiquated or otherwise problematic and where arbitral institutions or arbitration rules were used to resolve those problems. It might be useful to draw attention to such situations.

53. **Mr. Sikiric** (Croatia), supported by **Mr. Zhang** (Observer for the China International Economic and Trade Arbitration Commission), said that the language of the sentence in question simply conveyed that autonomous parties could override non-mandatory provisions of the applicable law, while mandatory provisions could not be overridden. Similar language was used in paragraph 5 to express the same principle. Paragraph 17 should therefore remain as drafted.

54. **Mr. Dennis** (United States of America) said that his delegation did not support the amendment proposed by the representative of Israel, since the provision as drafted reflected the long-standing position of the Commission that the arbitration rules selected by the parties governed except where those rules were in conflict with a mandatory provision of the law applicable to the arbitration; that principle was also reflected in article 1 of the UNCITRAL Arbitration Rules. However, he proposed the deletion of the last sentence of paragraph 17, as that sentence appeared to be unnecessary.

55. **The Chair** proposed that the words "may be better adapted to a particular case" in the last sentence of paragraph 17 be replaced with words along the lines of "may better reflect the intention of the parties", which would align the provision more closely with paragraph 5.

56. *It was so agreed.*

57. **Mr. Soweha** (Observer for Egypt) said that the existence of an arbitration agreement prior to the commencement of the arbitration needed to be clarified in paragraph 17, for the sake of consistency with paragraph 18. He therefore proposed adding the words "to the arbitration agreement" after the words "Usually, the parties" at the beginning of paragraph 17.

58. **The Chair** said that it was unnecessary to specify, in paragraph 17, the point at which an arbitration agreement had been concluded, as it was sufficient to state that the parties had agreed on a set of arbitration rules. However, in order to achieve consistency between the two paragraphs, paragraph 18 could be amended to clarify that the parties might not have specified a set of arbitration rules in an arbitration agreement or in a separate agreement before the arbitration commenced.

59. **Mr. Soweha** (Observer for Egypt) said that, since paragraph 18 referred both to the conclusion of an arbitration agreement prior to the arbitration and to a separate agreement — in another form — on a set of arbitration rules after the arbitration had commenced, paragraph 17 should refer specifically to cases in which an agreement had been concluded before the arbitration had commenced.

60. **The Chair** pointed out that since paragraph 17 provided for the selection of arbitration rules at any time, there was no need for that paragraph to state whether the rules had been selected before or after the arbitration had commenced, whereas paragraph 18 addressed specific situations in which the rules were selected after the proceedings had commenced. It was therefore paragraph 18 that should be amended.

61. **Mr. Zhang** (Observer for the China International Economic and Trade Arbitration Commission) proposed amending paragraph 18 to provide for situations where the parties agreed to choose one institution to administer the arbitration using the rules of another institution. The text as drafted referred only to the UNCITRAL Arbitration Rules and ad hoc rules, while there was no mention of the rules of other institutions. However, it should be borne in mind that such arrangements could lead to confusion or be otherwise problematic, for example, where the rules selected did not allow their use by another institution, as in the case of the International Chamber of Commerce (ICC) Rules of Arbitration.

62. **The Chair** said that the secretariat would find a suitable way of addressing that issue by giving the provision broader scope.

63. **Mr. Waincymer** (Observer for the Moot Alumni Association), endorsing the proposal made by the observer for the China International Economic and Trade Arbitration Commission, proposed that the words "ad hoc" be deleted to ensure that the Notes were not seen to be taking a position in favour of or against a particular set of rules.

64. **The Chair** said that the reference to ad hoc rules was intended to address the concern that the use of the rules of an arbitral institution without the arbitration being administered by that institution often led to confusion, delays and costs. Therefore, the wording of paragraph 18 should cover all possible situations.

65. **Mr. Waincymer** (Observer for the Moot Alumni Association) said that the way in which the second sentence of paragraph 18 had been structured did not address that concern adequately.

66. **The Chair** said that a separate paragraph might be needed to reflect the points raised by the observers for the China International Economic and Trade Arbitration Commission and the Moot Alumni Association.

67. **Mr. Dennis** (United States of America) expressed concern that the understanding of the sentence in question was being taken beyond the original intention of the provision, namely that if the parties chose the arbitration rules of an arbitration institution, or if they chose the UNCITRAL Arbitration Rules and then chose an institution to administer those rules, they would need to secure the agreement of the arbitration institution, as that institution might have rules on reviewing the independence and impartiality of the tribunal that had already been selected and might wish to carry out such a review before proceeding to administer the arbitration.

68. His delegation did not support amending the sentence to the effect that parties were free to choose the set of arbitration rules without securing such agreement, as that possibility had not been envisaged in the drafting of the revised Notes and the Notes should not encourage such practice. The situations described by the observer for the China International Economic and Trade Arbitration Commission were extremely rare and could present risks for the parties.

69. **The Chair** endorsed the comments made by the representative of the United States of America.

70. **Mr. Jacquet** (France), likewise expressing support for those comments, said that it was undesirable to expand paragraph 18 to cover theoretical situations in which one institution conducted proceedings on the basis of another institution's rules. It was important that the parties should secure the agreement of the arbitration institution to use a specific set of rules, including in situations in which the arbitration rules in question had been amended.

71. **Mr. Waincymer** (Observer for the Moot Alumni Association) endorsed the view that the Notes should not encourage an arbitration institution to use another institution's rules, one reason being that some institutions would find it objectionable if the arbitral tribunal was constituted without their review procedures' being followed. His delegation shared the concerns raised with regard to the final phrase of paragraph 18 ("regardless whether the arbitration is administered under the arbitration rules of that institution or under the UNCITRAL Arbitration Rules, or any other ad hoc rules"), and in view of those concerns proposed that that phrase be deleted, the paragraph thus ending with the words "to secure the agreement of that institution".

72. **The Chair** said he agreed that that phrase was unnecessary. Discussion of paragraph 18 would continue during informal consultations following the meeting in order to determine whether the proposed deletion would be detrimental to the text.

(b) Absence of an agreement on a set of arbitration rules (paragraph 19)

73. **Mr. Jacquet** (France) proposed that, since most arbitration agreements and arbitration laws, as well as the UNCITRAL Model Law on International Commercial Arbitration, provided for the possibility that the arbitral tribunal could refer to a set of arbitration rules, paragraph 19 be expanded to provide for the same possibility, within the limits of the applicable law.

74. **The Chair** said he took it that the Commission wished to accept that proposal.

75. *It was so agreed*.

Note 2. Language or languages of the arbitral proceedings

(a) Determination of the language(s) (paragraphs 20 and 21)

76. **Mr. Apter** (Israel) proposed that the words "are familiar with" in paragraph 20 be replaced with the words "can understand" or a similar alternative.

77. **The Chair** said he took it that the Commission wished to amend the paragraph along the lines of the alternative wording proposed.

78. *It was so decided*.

(b) Multiple languages (paragraph 22)

79. **The Chair** said that multiple languages were rarely used in arbitration proceedings, but such usage could both complicate and simplify proceedings. He took it that the Commission wished to retain the text of the paragraph as drafted.

80. *It was so decided*.

(c) Possible need for translation of documents in full or in part (paragraph 23)

81. **The Chair** said that, in view of the increasing frequency with which parties submitted legal authorities, some of which were voluminous, it might be desirable to clarify the possibility of limiting the translation of such documents to translation only of the relevant parts of those documents.

The meeting rose at 12.30 p.m.

Summary record of the 999th meeting
Held at the Vienna International Centre, Vienna, on Monday, 29 June 2015, at 2 p.m.

[A/CN.9/SR.999]

Chair: Mr. Schneider (Vice-Chair of the Commission, Chair of Working Group II) (Switzerland)

The meeting was called to order at 2.05 p.m.

Consideration of issues in the area of arbitration and conciliation (*continued*)

(a) Consideration and provisional approval of revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*) (A/CN.9/826, 832 and 844)

Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*)

Annotations

Note 1. Set of arbitration rules (*continued*)

(a) Selection of a set of arbitration rules (paragraphs 17 and 18) (*continued*)

1. **The Chair** said that no agreement had yet been reached, in informal consultations, as to how paragraphs 17 and 18 should be modified in such a way as to provide more broadly for situations in which the parties agreed to choose one institution to administer the arbitration using the rules of another institution, while emphasizing the need for the parties to secure the agreement of the institution concerned, particularly where an institution was selected by the parties after the tribunal had been constituted. At the same time, the Notes should draw attention to the undesirability of such practices in view of the problems that they could present. He suggested that the Commission return to its consideration of those paragraphs at a later stage.

2. *It was so agreed.*

Note 2. Language or languages of the arbitral proceedings (*continued*)

(c) Possible need for translation of documents in full or in part (paragraph 23) (*continued*)

3. **The Chair** said that the Commission might wish to consider, in addition to clarifying the possibility of limiting the translation of voluminous legal authorities, the possibility of addressing issues relating to legal authorities generally, particularly the fact that in some cases legal authorities might not be necessary, for example, if the tribunal was familiar with the case law relevant to the arbitration and, where applicable, the language or languages concerned. He therefore proposed the insertion of a new paragraph inviting the parties and the tribunal to consider the extent to which it was necessary to submit such documentation.

4. **Mr. D'Allaire** (Canada), endorsing those proposals, said that the provision could be made more comprehensive with respect to the type of documents for which a translation might be necessary. It was likely that evidence, for example, would need to be translated, whereas exchanges between the parties and proceedings submitted to the tribunal could be submitted in just one language. In his experience, tribunal members were often not only experts in the legal systems concerned and familiar with the applicable law, but were also able to understand legal issues in another language.

5. **The Chair** said that it had been pointed out, in informal consultations, that the word "document" was used inconsistently in the Notes. In some instances, for example, it referred to documentary evidence or legal authorities, whereas in others it was intended more broadly. It might, therefore, be useful to clarify those instances by distinguishing between different types of document.

6. **Ms. Magliana** (Observer for the Swiss Arbitration Association), expressing support for the Chair's proposal regarding legal authorities, said that that issue should be discussed between the tribunal and the parties at the outset of proceedings. She also expressed support for clarification of the use of the word "document" throughout the Notes. The use of the term "witness" should similarly be clarified throughout; for example, in paragraph 21 of document A/CN.9/844, it was unclear whether "witnesses" included expert witnesses.

7. **The Chair** said he took it that the Commission wished the secretariat to draft a new paragraph on legal authorities under note 2 (c) as proposed and to review the use of the words "document" and "witness" throughout the draft revised Notes in order to ensure clarity.

8. *It was so decided.*

Note 3. Place of arbitration

(b) Legal and other consequences of the place of arbitration (paragraphs 27-29)

(c) Possibility of holding hearings and meetings at a place different from the place of arbitration (paragraph 30)

9. **The Chair**, referring to paragraph 27, said that he had received written comments from the delegation of the International Council for Commercial Arbitration inviting the secretariat to consider referring not to judicial review as distinct from the setting aside of an arbitral award but, rather, to "judicial review (setting aside) of an arbitral award before the courts at the place of arbitration", in order to clarify that judicial review of an arbitral award would ordinarily consist of the hearing of an application to have the award set aside before the courts at the place of arbitration. He recalled that, at the time of drafting of the original Notes, there had been discussion of whether

judicial review and the setting aside of an arbitral award should be treated as synonymous, but it had subsequently been agreed that a distinction should be made because some types of judicial review were broader than the setting aside of an award, or covered different aspects. He asked whether the Commission wished to preserve that distinction.

10. **Mr. Selivon** (Observer for the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry) said that in the Russian text of the draft revised Notes, the terms used to translate "judicial review" and "setting aside" expressed different legal concepts that had different legal bases and consequences, the Russian equivalent of "setting aside" simply meaning "annulment". "For the sake of consistency with the UNCITRAL Model Law on International Commercial Arbitration, article 34 of which provided that recourse against an arbitral award could be made only by an application for setting aside, it would be more logical for the Notes to refer solely to the setting aside of an award.

11. **The Chair** recalled that the Working Group, in the course of its deliberations, had concluded that both judicial review and the setting aside of an award were possible interventions by the court that might influence selection of the place of arbitration. He took it that the Commission wished to retain both concepts.

12. *It was so decided.*

13. **Mr. Greenberg** (Australia), referring to paragraph 29 (iv), said that qualification restrictions with respect to counsel representation could be included among the legal factors listed in paragraph 28, since that factor related to the legal seat of arbitration rather than, or in addition to, the place of the hearings in that an award might be challenged on the grounds that the counsel had not been qualified to practise at the seat of arbitration.

14. **Mr. Castello** (United States of America) said that while he agreed that qualification restrictions might affect both the choice of the legal seat of arbitration and the place of the hearings, simple repetition of the text of paragraph 29 (iv) in paragraph 28 would be undesirable since the implications of such restrictions with respect to the seat of arbitration differed from their implications with respect to the hearings. In the case of the latter, the concern that should be addressed was that a counsel of record might be requested to appear at a hearing in a jurisdiction in which that counsel was prohibited from appearing in arbitral proceedings.

15. **The Chair** said that he understood the point raised by the representative of Australia to be that qualification restrictions with respect to counsel representation were a general legal factor that could affect the validity of submissions and the right or power of an arbitrator to take those submissions into consideration, whereas the concern raised by the representative of the United States of America was an additional consideration, namely that a jurisdiction's restriction of representation might affect the right of a party to be heard. Qualification restrictions therefore posed a problem both more generally under paragraph 28 and in specific circumstances falling within the scope of both that paragraph and paragraph 29. It might therefore be necessary to consider the issue separately in the context of each paragraph.

16. **Ms. Yasseen** (Observer for the Swiss Arbitration Association) asked whether "counsel representation" referred to every counsel representing a party, any qualification restrictions thus applying to all such counsel, or whether it sufficed for only one of the counsel to be qualified. Clarification on that point might help to address the concerns raised.

17. **The Chair** wondered whether use of the word "counsel" posed a problem given that non-lawyers could also appear on behalf of parties in an arbitration, a fact that should be reflected in the Notes.

18. **Mr. Jacquet** (France) said that qualification restrictions should not be determined by the law of the place of arbitration; it should suffice for a counsel to have been admitted to the Bar in any jurisdiction, provided that the legislation in accordance with which he or she had been admitted was in line with the applicable arbitration rules. However, there were a number of States whose legislation prohibited foreign counsel from appearing in arbitration proceedings in those States. Those considerations should be reflected in the Notes.

19. He drew attention to the fact that the term "counsel" had been mistranslated in the French text of paragraph 29 as "*conseillers juridiques*", "*conseillers*" meaning, inter alia, "counsellors" or "councillors".

20. **The Chair** suggested that, in view of the comments made, paragraph 29 (iv) be retained but modified along the lines suggested by the representatives of Australia, France and the United States. The secretariat had pointed out that there might also be restrictions in some States regarding the qualification of arbitrators, and it might therefore be desirable to include a reference to such restrictions in paragraph 28. He took it that the Commission wished the secretariat to modify the two paragraphs accordingly.

21. *It was so decided.*

22. **Mr. Apter** (Israel) said that it was unclear whether paragraph 30 referred to all hearings and meetings or only some. If all hearings and meetings were to be held outside the place of arbitration in accordance with the rules of the arbitration institution concerned, assuming that that was permitted by the applicable arbitration law or rules, as indeed the paragraph indicated as often being the case, it should be highlighted, possibly by reference to the factors listed in paragraph 28, that the parties should take into consideration the possible impact of that arrangement on the validity and enforceability of the award.

23. **The Chair** said he took it that the Commission wished to amend paragraph 30 to that effect.

24. *It was so decided.*

25. **Ms. Yasseen** (Observer for the Swiss Arbitration Association) wondered whether the words "expeditious or convenient" were sufficiently broad to cover extreme situations, such as those of armed conflict. She also wondered whether the paragraph should draw attention to the fact that some arbitration institutions and arbitration laws required arbitrators to sign the award at the place of arbitration or arrange for a person to sign on their behalf, or whether that factor fell within the scope of paragraph 28 (i) ("the suitability of the applicable arbitration law at the place of arbitration").

26. The **Chair** said that, unless any views to the contrary were expressed, it was his understanding that the words "expeditious or convenient" sufficed to cover any such situations.

27. While the requirement for arbitrators to sign an award at the place of arbitration could indeed pose a major inconvenience — and sometimes a costly one — if hearings and meetings were held at a place other than the place of arbitration, such situations were covered by paragraph 28 (i). However, it might be useful to emphasize that arbitrators unfamiliar with the law of the place of arbitration, particularly when arbitrating in that jurisdiction for the first time, should ensure at the outset that they were aware of any potential problems arising from the requirements of that law. While that might be obvious, even experienced arbitrators might neglect to ensure that they were fully familiar with those requirements, as indeed had occurred in his experience.

28. **Mr. Snijders** (Observer for the Netherlands), expressing support for that suggestion, said that it might be helpful if additional guidance was provided in paragraph 27 with respect to the legal consequences of the place of arbitration, particularly the possibility that the validity of the award might be affected. While that paragraph was intended to encompass any possible legal consequences, it focused on the functions of the court at the place of arbitration rather than on consequences with respect to the arbitral proceedings themselves, such as the impact of the selection of the place of arbitration on the validity of the award, the appointment of the arbitrators and requirements relating to the signing of the award, including the question of whether all the arbitrators were required to sign. While paragraph 28 set out a broad range of factors that should be taken into consideration when deciding on a place of arbitration, arbitrators might not be immediately aware of the importance of those factors. Moreover, it was often the case that the parties themselves selected the place of arbitration rather than the tribunal.

29. **Ms. Cordero-Moss** (Observer for Norway), echoing the concerns raised, said that it might be useful to highlight that the applicable arbitration law had an impact on proceedings that went beyond the aspects already listed in paragraph 28. While that list could not be made exhaustive, her delegation supported the proposal to draw the attention of arbitrators to the importance of familiarizing themselves with that law. It might also be useful for the Notes to refer to the impact of the applicable law not only in relation to the proceedings but also in general. For example, the arbitral tribunal might wish to consider whether the parties had agreed on the law applicable to the merits of the dispute; if so, attention could be drawn to the fact that not all elements of the dispute would necessarily be subject to the law that the parties had chosen, and indeed those elements might be governed by various laws. That would be the case, for example, with regard to the legal capacity of the parties. Ignorance of such elements could lead to the annulment of an arbitral award or refusal of enforcement.

30. **The Chair** said that while it would be useful for the tribunal and the parties to be aware of the scope of the applicable substantive law, the manner in which the tribunal addressed the substance of the case was beyond the scope of the Notes.

31. **Mr. Snijders** (Observer for the Netherlands) said that he appreciated that it would be undesirable for the Notes to address substantive issues, but agreed with the observer for Norway that the Notes should draw attention to the fact that not all arbitrators were aware that laws other than the applicable arbitration law might apply to certain elements of the dispute if so agreed by the parties.

32. **Mr. Castello** (United States of America) said that, while he agreed that substantive issues raised by the applicable law could be important and in some cases more complicated than the parties might anticipate, he also agreed with the Chair that the Notes should avoid dealing with substantive aspects.

33. **Ms. Bensefa** (Algeria), supported by Mr. Jacquet (France), said it should be borne in mind that in some arbitrations, the law applicable to the arbitration was not the law of the place of arbitration. In such cases, a compromise was sometimes required, particularly in the case of different legal systems and different languages. She agreed that the substantive issues arising from the choice of the place of arbitration were broad and complex and should therefore not be addressed in the Notes.

34. **The Chair** said he took it that the Commission wished to expand the list of legal consequences of the choice of the place of arbitration as set out in paragraph 27 and to provide that arbitrators and parties should familiarize themselves with the applicable arbitration law.

35. *It was so decided.*

Note 4. Administrative support that may be needed for the arbitral tribunal to carry out its functions

(a) Administrative support and arbitral institutions (paragraphs 31-33)

36. **The Chair** said that the first sentence of paragraph 33 might be too restrictive in that it should provide not only for situations in which a case was not administered by an arbitral institution but also for those in which the case was administered by an arbitral institution but that institution did not provide administrative support, or provided only certain services. Moreover, the services provided by arbitral institutions varied considerably.

37. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration), endorsing those comments, pointed out that the fact that the first sentence referred only to cases that were not administered by an arbitral institution was also at odds with the third sentence ("Some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in supporting arbitral proceedings").

38. **The Chair** suggested that, in order to address the concerns raised, the first sentence be amended to read along the lines of "Unless the administrative arrangements for the proceedings are made by an arbitral institution, they will usually be made by the parties or the arbitral tribunal".

39. *It was so decided.*

(b) Secretary to arbitral tribunal (paragraphs 34-37)

40. **Mr. Soweha** (Observer for Egypt), referring to the final sentence of paragraph 35, said that the word "normally" in the phrase "secretaries would normally not be involved in the arbitral tribunal's decision-making functions" implied that such involvement was possible, whereas it was his understanding that it was not. He asked whether there were situations in which secretaries might be involved in decision-making and, if so, whether such involvement required the secretary to take any kind of oath or to have qualified for such a role by passing a competitive examination, for example.

41. **The Chair** said that there were some cases in which secretaries drafted awards or provided legal advice. Paragraph 35 had therefore been drafted in such a way as to avoid precluding that possibility or being prescriptive.

42. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) wondered whether those objectives could be achieved by returning to the original wording used in the final sentence of paragraph 27 of the Notes ("However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal"), in which the word "typically" allowed for differences in practice.

43. **The Chair** suggested that the Commission return to its consideration of paragraphs 34-37 at a later stage

44. *It was so agreed.*

Note 5. Cost of arbitration

(a) Items of cost (fees and other expenses) (paragraphs 38-40)

45. **Mr. Greenberg** (Australia) said that paragraph 38 should be modified to clarify that it was only the recoverable costs of the arbitration, rather than the total costs, that were determined by the tribunal, unless that point was adequately addressed in paragraph 46. Moreover, the arbitral tribunal did not determine the legal costs of the arbitration.

46. **The Chair** said that it should also be clarified that, in some cases, the fees and expenses of the arbitral tribunal were determined by the arbitral institution. It was for the tribunal to consider whether such costs were reasonable and the extent to which they were recoverable.

47. **Ms. Bensefa** (Algeria) said that the meaning of the word "reasonable" in the first sentence of paragraph 38 should be clarified, possibly by replacing the words "the legal and other costs" in subparagraph (ii) with the words "representation costs and other necessary costs". The question of whether costs were "necessary" was obviously subjective and would have to be addressed by the tribunal once it had determined whether or not those costs were recoverable.

48. **The Chair** said that items of cost and the determination by the tribunal as to whether costs were reasonable should be addressed separately.

49. **Mr. Apter** (Israel) said that the wording "it is useful for the arbitral tribunal to identify at the outset of the proceedings how it intends to deal with those matters" in paragraph 39 was vague and did not reflect the agreement reached by the Working Group (A/CN.9/832, paragraph 103) to set out provisional criteria for apportioning costs between the parties. While those criteria could also be addressed under paragraphs 45-47 on cost allocation, it would be useful to refer to them in paragraph 39.

50. **The Chair** said that the paragraph had been drafted using very general language in order to avoid excessive discussion as to the extent to which the tribunal should engage in cost management at the outset of an arbitration, particularly since that issue was presently the subject of general debate. In some jurisdictions, for example, tribunals required the parties to submit budgets in advance and based cost allocation solely on those budgets. Such practice, while potentially helpful in controlling costs, could lead to disputes regarding the admissibility and reasonableness of the budgets, which in turn could give rise to parallel arbitration proceedings concerning the costs.

51. **Mr. Malhotra** (India) said that the draft revised Notes should emphasize that costs should be decided on at the outset of proceedings and should be reasonable. While the question of "reasonableness" posed few problems in institutional arbitration since most arbitral institutions bore the costs of arbitration themselves, the issue was a serious one in the case of ad hoc arbitration.

52. **The Chair** said that it would be helpful if the draft revised Notes stated that it was the responsibility of the arbitral tribunal to ensure that costs were reasonable, including with regard to the determination and allocation of recoverable cost. While the costs to be considered would depend on whether the arbitration was conducted by an institution or was ad hoc, that determination would need to be made in both cases.

53. **Ms. Bustamante** (Ecuador) said that more precise and careful wording was needed in order to clarify what

was meant by "other costs" in paragraph 38, how the tribunal would decide on cost allocation and what matters relating to cost might not be decided by the tribunal, such as the tribunal's own fees.

54. **The Chair** suggested that further consideration be given to paragraphs 38-40 in informal consultations.

The meeting was suspended at 3.40 p.m. and resumed at 4.10 p.m.

55. **Ms. Montineri** (International Trade Law Division) said that, in view of the need to rework certain parts of the draft revised Notes on the basis of the changes agreed upon thus far and those still under discussion, as well as the provisions yet to be discussed, it was unlikely that the revision could be completed within two weeks of the end of the Commission's session, given the work involved. Furthermore, the secretariat had received expressions of interest from a number of institutions and organizations wishing to submit comments on the revised Notes once they had been considered by the Commission at its present session. The secretariat therefore proposed that the Commission, at its present session, approve in principle the various modifications agreed upon but postpone adoption of the text until its forty-ninth session. The secretariat would produce a revised text following the forty-eighth session, possibly in September 2015, and circulate that text to member States and institutions, inter alia through conferences, after which a final text would be submitted to the Commission in 2016. Thus, the text would not be referred back to the Working Group, but instead two or three days of the Commission's forty-ninth session could be devoted to its consideration with a view to its finalization and adoption.

56. **The Chair** said it should be borne in mind that the Working Group, at its sixty-second session, had not been able to complete its review of the Notes and a number of substantive points would require discussion before the text could be finalized.

Note 4. Administrative support that may be needed for the arbitral tribunal to carry out its functions (*continued*)

(b) Secretary to arbitral tribunal (paragraphs 34-37) (*continued*)

57. **Mr. Schwarzenbacher** (Austria), referring to previous comments made with regard to the involvement of secretaries in the arbitral tribunal's decision-making functions (paragraph 35), said that in the case of institutional arbitration in Austria, secretaries were the only lawyers involved in the proceedings and their role was to provide legal advice and draft awards. Given that those responsibilities might have an impact on decision-making, his delegation would prefer to retain the final sentence of paragraph 35 of document A/CN.9/844 rather than the final sentence of paragraph 27 of the original Notes.

58. **The Chair** said that the original wording had been modified precisely in order to allow for such practices while at the same time clarifying that it was usually the practice for secretaries not to be involved in decision-making. The question was whether the revised wording achieved that aim.

59. **Ms. Bustamante** (Ecuador) suggested that the issue might be resolved simply by clarifying that only arbitrators had the power to make decisions, without referring to secretaries.

60. **Mr. Selivon** (Observer for the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry), endorsing that proposal, said that the Notes should avoid any suggestion that secretaries could play a part in decision-making, which was the exclusive role of the members of the arbitral tribunal. In practice, it should be made clear to the parties in an arbitration what the precise role of the secretary was.

61. **Mr. Soweha** (Observer for Egypt) expressed support for reinstatement of the wording of the final sentence of paragraph 27 of the Notes, since that wording reflected practice more accurately. If the secretary was involved in decision-making, that would mean that he or she was also involved in the deliberations of the tribunal, an arrangement that would very probably be unacceptable to the parties given that the secretary would not have been selected by them.

62. **The Chair** said that it was important to bear in mind the considerable variation in practice with regard to the role of the secretary, and the need to ensure the non-prescriptiveness of the Notes. Secretaries often played a useful role in assisting the tribunal during its deliberations.

63. **Mr. Möller** (Observer for Finland), expressing support for the comments made by the observers for Egypt and the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, said that the original wording referred to did not rule out more unusual practices allowing secretaries to play a part in decision-making, but discouraged such practices. While secretaries might well be present during the deliberations of the tribunal, that did not mean that they were participating in decision-making. While he agreed with the intention of the revised provision, he was concerned that it might be misunderstood. The solution proposed by the representative of Ecuador was preferable in that it would avoid any such misunderstanding.

64. **Mr. Schwarzenbacher** (Austria) said that, if the provision were reformulated to state that decision-making powers lay solely with the arbitral tribunal, a proposal that his delegation supported, it might be advisable to include wording to the effect that the provision of legal advice by the secretary was not precluded.

65. **The Chair** said that such wording might wrongly suggest that it was normal practice for secretaries to provide legal advice, although it was important that such a possibility was not ruled out. It might also require further elaboration to the effect that certain qualifications might be needed in order for a secretary to provide such advice.

66. **Mr. Wen** (China) said that it might be helpful for the Notes to clarify that while secretaries could not exert any influence on the substance of the arbitration, they could, in certain instances, provide advice on procedural matters.

67. **The Chair** said that the final sentence of paragraph 35 of the draft revised Notes could be modified to reflect that possibility.

68. **Mr. Snijders** (Observer for the Netherlands) expressed support for the proposals made by the representatives of Ecuador and Austria. In commodity arbitration, for example, it was sometimes the case that experts dealing with the case were not lawyers, whereas the secretary was the only lawyer involved, as a natural consequence of which he or she gave advice on legal matters. He assumed that there were many countries whose arbitral institutions comprised experts who were not professionals in the field of law supported by a secretary who was such a professional.

69. **Ms. Jamschon Mac Garry** (Argentina) said that while her delegation preferred the original wording of paragraph 27 of the Notes, the revised wording as in paragraph 35 of document A/CN.9/844 was also acceptable, both formulations being sufficient to cover the more unusual practices referred to by other speakers. While the proposal made by the representative of Ecuador was a welcome one, its further elaboration as suggested by the representative of Austria might cause complications by prolonging debate on the issue.

70. **Mr. Lee** (Republic of Korea) said that the wording of paragraph 35 of the draft revised Notes as it stood was satisfactory.

71. **Mr. Bobei** (Observer for Romania) wondered whether the Notes should expressly state that legal advice provided by a secretary would not be legally binding, or whether that was understood.

72. **The Chair** suggested that the Commission return to its consideration of Note 4 (b) at a later stage.

73. *It was so agreed.*

Note 5. Cost of arbitration (*continued*)

(a) Items of cost (fees and other expenses) (paragraphs 38-40) (*continued*)

(c) Cost allocation (paragraphs 45-47)

74. **The Chair** said that the emerging consensus was that paragraphs 38-40 should first clarify what was meant by "costs" and go on to emphasize the responsibility of the arbitral tribunal for ensuring the reasonableness of those costs, including its own fees and expenses and, in the context of cost allocation, the costs for which a party was entitled to compensation. That raised the question of the stage at which such a determination might be made, and whether the Notes should provide for the possibility of cost decisions during the proceedings, in the award itself or subsequent to the rendering of the award, in a separate decision on costs. That question was partly addressed in paragraph 47.

75. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) said that the first sentence of paragraph 47 might be misunderstood as suggesting that decisions on costs and their allocation were never included in the final award. In order to avoid such a misunderstanding, she proposed that the word "necessarily" be inserted between the words "not" and "need", the sentence thus reading "Decisions by the arbitral tribunal on cost allocation do not necessarily need to be made when the final award on the merits is rendered."

76. **Mr. Möller** (Observer for Finland), expressing support for that proposal, said that the Notes should provide for the possibility that a decision on costs might be taken after an award on the merits had been rendered.

77. **The Chair** said that a possible consequence of a separate decision on costs following the rendering of the award was that the parties were more likely to dispute that decision than if it was made before the outcome of the arbitration was known. However, he agreed that that possibility should be provided for. He took it that the Commission wished to amend paragraph 47 as proposed and to modify paragraphs 38-40 in the light of the views expressed.

78. *It was so decided.*

(b) Deposit of costs (paragraphs 41-44)

79. **Mr. Balaš** (Czech Republic) said that in investment disputes, it was often difficult to ensure that costs were paid by the losing party. He wondered whether that problem could be solved solely through the requirement that a deposit be paid. Even where the likely outcome of the arbitration was known, that likelihood could not be used as the basis for requesting the weaker party to pay a higher deposit.

80. **The Chair** said that the deposit was usually paid by both parties in equal shares; the issue raised by the representative of the Czech Republic concerned security for costs, which was not addressed in the draft revised Notes but was an issue that arose with increasing frequency, particularly in the context of the funding of arbitration. He asked whether the Notes should address that issue.

81. **Mr. Hahnkamper** (Observer for the Chartered Institute of Arbitrators) said that the question of whether the tribunal should request security for costs depended on the applicable arbitration law rather than relating to the organization of the proceedings. He therefore wondered how useful it would be to refer to that issue in the Notes.

82. **The Chair** said that addressing security for costs might raise a number of problematic issues. Unless there were further comments, he would take it that the Commission did not wish the Notes to address that issue.

The meeting rose at 5 p.m.

Summary record of the 1000th meeting
Held at the Vienna International Centre, Vienna, on Tuesday, 30 June 2015, at 9.30 a.m.

[A/CN.9/SR.1000]

Chair: Mr. Schneider (Vice-Chair of the Commission, Chair of Working Group II) (Switzerland)

The meeting was called to order at 9.40 a.m.

Consideration of issues in the area of arbitration and conciliation (*continued*)

(a) Consideration and provisional approval of revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*) (A/CN.9/826, 832 and 844)

Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (continued)

Note 5. Cost of arbitration (continued)

(b) Deposit of costs (paragraphs 41-44) (continued)

1. **The Chair** proposed that the word "will" in the second sentence of paragraph 41 be replaced with the word "may" and that the order of the first and second sentences of the paragraph be reversed. He further proposed that the reference to paragraphs 38 (i) and (iii) be deleted.

2. *It was so decided*.

(c) Cost allocation (paragraphs 45-47)(continued)

3. **Mr. Castello** (United States of America) said that paragraph 46 should be expanded to explain the possible bases for the tribunal's decision with regard to cost allocation, which would include agreement between the parties on a cost allocation method, as referred to at the end of paragraph 45. That would make the link between the two paragraphs clearer. Furthermore, it was important to clarify the type of procedural request that might constitute negative conduct influencing the allocation of cost and thus be comparable to such conduct as failure to comply with a procedural order. He therefore proposed that paragraph 46 be reformulated along the following lines: "In applying any allocation method agreed by the parties or specified by the applicable arbitration law or arbitral rules or, in the absence of such agreement or specification, such other method as the tribunal may deem appropriate, the arbitral tribunal may also wish to consider the conduct of the parties. Conduct so considered might include failure to comply with procedural orders and/or procedural requests by the parties (for example, document requests, procedural applications and cross-examination requests) that the tribunal deems to have contributed to delay or disruption of the proceedings."

4. **The Chair** wondered whether, rather than listing the possible bases for the tribunal's decision on cost allocation, there might be a more general way of referring to them. With regard to the proposed qualification concerning the conduct of the parties, it might be helpful to provide further clarification by using a word such as "abusive" or "unjustified" to describe the type of conduct that could have an impact on cost allocation, given that a tribunal might determine that a request was justified even if it caused delay.

5. **Ms. Bensaoula** (Algeria), endorsing that suggestion, pointed out that it would be for the tribunal to determine what constituted abusive conduct.

6. **Mr. Jacquet** (France) said that both the final sentence of paragraph 45 and the proposed text of paragraph 46 should clarify the discretionary power of the arbitral tribunal to decide on cost allocation, and also refer to the principle of "costs follow the event", cost allocation usually being based on the outcome of the arbitration.

7. **The Chair** said that that principle was indeed widely and increasingly applied and should be reflected in the Notes, particularly given its relevance with respect to the conduct of the parties. It might also be helpful for paragraph 46 to refer to the differences in practice with respect to cost allocation.

8. **Mr. Popkov** (Belarus), expressing support for the proposals made with respect to paragraphs 45 and 46, said that it was important not only to specify the possible bases for the cost allocation method but also to clarify the relationship between them, i.e., in what circumstances and at what stage they would come into play.

9. **Mr. Apter** (Israel), recalling the Commission's discussions on note 5 (a) at its previous meeting, reiterated his earlier comment that the Notes should, as agreed by the Working Group, set out criteria for cost allocation, indicating the main options available and highlighting the power of the tribunal with regard to the final decision on cost, without being prescriptive. It was important for parties to know what those criteria were, especially where they had not agreed on a specific cost allocation method or selected a set of arbitration rules.

10. **Mr. Zhang** (Observer for the China International Economic and Trade Arbitration Commission) said it should be clarified that, where the parties had agreed on a cost allocation method, the arbitral tribunal would apply that method during the course of the proceedings but had the power to revise the cost allocation upon conclusion of those proceedings, on the basis of their outcome.

11. **Mr. Soweha** (Observer for Egypt), referring to the first sentence of paragraph 47, suggested that the words "on the merits" be deleted, since some awards might not be on the merits but were nonetheless considered final, such as an award on jurisdiction.

12. **The Chair**, endorsing that suggestion, said he agreed that there were various decisions that ended an arbitration and were accompanied by a decision on costs, including decisions to terminate the proceedings. The paragraph should also reflect the possibility of a separate decision on costs after the rendering of the award.

13. He took it that the Commission wished the secretariat to revise paragraphs 45-47 in the light of the comments and proposals made.

14. *It was so decided*.

Note 6. Information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration

(a) Agreement on confidentiality (paragraphs 48-52)

15. **Mr. Greenberg** (Australia) wondered whether the words "or law" should be inserted at the end of the phrase "in the absence of provisions on the matter in the applicable arbitration rules" in paragraph 49, given that some arbitration laws established provisions on confidentiality.

16. **Ms. Cordero-Moss** (Observer for Norway) said that while she appreciated the advisability of including a reference to the applicable arbitration law, confidentiality provisions in arbitration laws were often default rules that could be derogated from if the parties so agreed, particularly if the provisions of the applicable arbitration law were considered by the parties to be insufficient or inadequate.

17. **Ms. Yasseen** (Observer for the Swiss Arbitration Association) said that it might be useful to provide in more detail, possibly in paragraph 49 or paragraph 52, for situations in which the parties came from different jurisdictions and were thus subject to different obligations with respect to confidentiality, in accordance with the respective laws of those jurisdictions.

18. **The Chair** said it was his understanding that that situation was addressed broadly in paragraph 51, although it might be necessary to expand that paragraph to provide for specific arrangements ensuring that not only parties but arbitrators had access to necessary information. The purpose of paragraph 52, on the other hand, was to highlight that arbitrators were required to maintain the confidentiality of the proceedings irrespective of any differences between the parties with respect to the obligations of confidentiality to which they were subject.

19. **Mr. Castello** (United States of America), concurring with the comment made by the observer for Norway, said that that point could be accommodated in paragraph 49 by replacing the words "in the absence of provisions on the matter in the applicable arbitration rules" with wording along the lines of "should the parties not be satisfied with the treatment of that subject by any non-mandatory provisions in the applicable arbitration rules or law", bearing in mind that some confidentiality provisions in arbitration laws or rules were mandatory.

20. **The Chair** said he took it that the Commission wished to accept that proposal.

21. *It was so decided*.

(b) Transparency in treaty-based investor-State arbitration (paragraph 53)

22. **The Chair** drew attention to the fact that the footnote to paragraph 53 constituted an exception to the general approach of avoiding reference to other rules governing transparency in relation to investment arbitration, the difference between the general principle of confidentiality in commercial arbitration and transparency rules in treaty-based investment arbitration being of such importance that it had been considered important to highlight.

23. **Ms. Cordero-Moss** (Observer for Norway) said that the final sentence of the paragraph, and the footnote, were potentially misleading in that they suggested that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration applied only if they were referred to in an investment treaty that was the basis for a dispute, whereas that was not necessarily the case; the States parties to such a treaty might come to a separate agreement to apply the Rules.

24. **The Chair** said he took it that the Commission wished to modify paragraph 53 in order to address that concern.

25. *It was so decided*.

Note 7. Means of communication

(a) Determination of the means of communication (paragraphs 54 and 55)

(b) Electronic means of communication (paragraph 56)

(c) Flow of communication (paragraph 57)

26. **The Chair** recalled the Working Group's agreement that the wording used in the Notes when referring to technological means of communication should be sufficiently broad as to allow for advances in technology, thus ensuring that such references retained their relevance in the future.

27. **Mr. Apter** (Israel) proposed that the word "electronic", wherever used in reference to means of communication, be replaced with the word "technological". He further proposed that, in the final sentence of paragraph 56, cost be included among the issues to be considered by the parties and the arbitral tribunal when selecting such means of communication, given that that selection could have significant cost implications.

28. **The Chair** said that paragraph 56 was particularly important given that the electronic means available to the parties, the electronic communication infrastructure in the States concerned and the degree of familiarity — not only of parties but also of arbitrators — with certain

technological means of communication varied greatly. It was important to highlight that diversity.

29. **Mr. Jacquet** (France), drawing attention to paragraph 54 (iii), said that while he had no objection to the reference to the acceptability of means of communication under the applicable arbitration law, he wondered whether the reference to paragraphs 65 and 79 was appropriate given that no arbitration law was likely to address means of communication at the level of detail presented in those paragraphs.

30. **The Chair** said that the cross reference was intended to relate to paragraph 54 as a whole rather than suggesting the possible nature of relevant provisions in an arbitration law. In order to avoid confusion, the reference could be moved or simply deleted.

31. **Mr. Lee** (Republic of Korea) said that the heading of note 7 (c) ("Flow of communication") did not clearly capture the purpose of paragraph 57, which dealt with the specific manner in which communication should take place rather than simply the flow of communication. He also wondered whether reference should be made to the prohibition of ex-parte communication.

32. **The Chair** said it was his understanding that the paragraph addressed the issue of whether communications flowed between parties and the tribunal directly or, as was sometimes the case, through an intermediary, and that that intention was therefore adequately captured by the word "flow".

33. **Ms. Jamschon Mac Garry** (Argentina) said that while her delegation would prefer to retain the paragraph and heading as drafted, the word "exchange" might be a possible alternative to the word "flow".

34. **Ms. Yasseen** (Observer for the Swiss Arbitration Association) said that she shared the concern raised by the representative of the Republic of Korea with regard to the issue of ex-parte communication issue; specifically, in the final sentence of paragraph 57, the word "usual" in "It is usual that all parties are copied on all communications" suggested that ex-parte communication might be permitted.

35. **The Chair** said that it would be both undesirable and difficult to accommodate the issue of ex-parte communication in paragraph 57.

Note 8. Interim measures

(a) Granting of interim measures (paragraphs 58-60)

36. **Mr. Castello** (United States of America) said that the first sentence of paragraph 59 referred not to one principle, as indicated by the words "An established principle is", but to two, the first being that a party could request an interim measure from a domestic court before or during the arbitral proceedings and the second being that such a request was not incompatible with an agreement to arbitrate, nor was it a waiver of such an agreement. To state that that first principle was an established principle was at odds with the immediately preceding paragraph, the second sentence of which stated that "Arbitral laws vary in their approach on whether a party is to apply initially to the arbitral tribunal rather than to the domestic court […]". The essential element of the beginning of paragraph 59 was in fact the second principle. He therefore proposed that, in the first sentence, the words "may be" be deleted and the words "and that such a request would not be" be replaced with the words "is not", the sentence thus reading: "An established principle is that a request for an interim measure made by a party to a domestic court before or during the arbitral proceedings is not incompatible with an agreement to arbitrate."

37. **Mr. Jacquet** (France) said that while he had no objection to the proposed wording, that wording gave the impression that it was always possible for a party to request an interim measure from a domestic court. It was important to clarify that that was not the case, possibly by modifying the beginning of the proposed sentence to read along the lines of "When it is possible for a party to request an interim measure from a domestic court […]" and adjusting the remainder of the sentence accordingly.

38. **The Chair** took it that the Commission wished to accept the proposals made.

39. *It was so decided*.

40. **Mr. Castello** (United States of America), referring to the final sentence of paragraph 59, said that the statement that interim measures could take the form of an award contradicted the immediately preceding statement that such measures were temporary in nature — a feature of interim measures that was emphasized both in the UNCITRAL Arbitration Rules as revised in 2010 and in the UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006 — given that awards were final and binding, as established in the UNCITRAL Arbitration Rules. He recalled that wording similar to that used in paragraph 59 had been used in the Model Law as amended in 2006 (article 17 (2)) because, in the context of enforcement, it had been considered important to ensure that an interim measure ordered by a tribunal was not deprived of its character as such simply because the tribunal decided to issue that measure as an award; however, reference to the form of interim measures had been removed from the UNCITRAL Arbitration Rules at the time of their revision in 2010 because the issuing of an interim measure as an award created great complications. In the context of the Notes, he wondered whether it was necessary to refer to the form that an interim award might take. If not, the final sentence could simply read "An interim measure is usually temporary in nature."

41. **The Chair**, expressing support for those comments, wondered whether the Commission should address in some way — although not in the Notes — the potential confusion arising from the manner in which the Model Law dealt with interim measures.

42. **Mr. Castello** (United States of America) said that, provided that the description of interim measures set out in the Notes did not go into too much detail, it might be useful

to explain why in general it was preferable to issue an interim measure as an order rather than an award. In that context, he pointed out that many arbitral institutions had, in the past 10 years, amended their rules to include provisions on the appointment of an emergency arbitrator before the tribunal was constituted, many of those rules specifically requiring that any decision issued by an emergency arbitrator on the application of an interim measure must be in the form of an order because that decision must be capable of being revised or annulled by the arbitral tribunal once constituted.

43. **The Chair** said that that point raised the additional question of whether the Notes should include a reference to emergency arbitrators. The treatment of interim measures as awards had given rise to case law that had compounded the confusion with respect to the form of such measures. He suggested that, taking into account the comments made by the representative of the United States, the secretariat redraft paragraph 59 in such a way as to provide further explanation without entering into excessive detail. Any proposals submitted by delegations in that regard could then be discussed later in the session.

44. **Mr. D'Allaire** (Canada) said that while his delegation had no objection to the proposed changes to the first sentence of paragraph 59, it shared the concerns expressed with regard to the reference, at the end of that paragraph, to the form of interim measures, since that issue was beyond the scope of the Notes. In that regard, he pointed out that under note 20 of the draft revised Notes, paragraph 137 provided limited guidance on requirements concerning the form and content of awards for the very reason that it had been felt that such guidance was, similarly, beyond the scope of the Notes.

45. **The Chair** recalled that the Working Group had previously discussed whether guidance on the form of awards should be included in the Notes at all. The Commission's decision on the treatment of interim measures would therefore depend on its decision with regard to note 20. While guidance on the form and content of orders for interim measures or of awards could be useful, the Notes might not be the most appropriate instrument for such guidance, and the introduction of relevant provisions in the Notes would require very delicate drafting. He therefore suggested that the Commission return to its consideration of the issue when discussing note 20.

46. **Mr. Bobei** (Observer for Romania), referring to the question of whether there should be a reference to emergency arbitrator, wondered whether the words "before or during the arbitral proceedings" in the first sentence of paragraph 59 should be amended to include a reference to the time at which the arbitral tribunal was constituted, thus providing for the possibility that emergency arbitrator provisions might apply.

47. **The Chair** said that, unless there were comments in support of that proposal, he would take it that the Commission did not wish to include such a reference.

48. **Mr. Castello** (United States of America), drawing attention to paragraph 60, said that the words "Where relevant" at the beginning of the first sentence were unclear. If the paragraph was to be understood as referring to the time at which the arbitral tribunal received a request for an interim measure, it was questionable whether it would be desirable for the tribunal, at that stage, to provide the parties with the information referred to, particularly since the tribunal would presumably wish to consider the request before providing the parties with such information, as indeed would be in line with the advice set out in note 7 of the draft revised Notes. Moreover, some of the information referred to could probably be ascertained by the parties themselves from the applicable law or rules, as in the case of items (i) and (ii), while other information, such as the type of measures that the tribunal might grant, depended to a far greater extent on the discretion of the tribunal. He therefore wondered whether the paragraph as a whole was necessary, since it did not appear to reflect any particular decision or conclusion of the Working Group.

49. **The Chair** said that the paragraph could, in the light of those comments, be deleted; alternatively, if it was considered useful, it could be clarified by replacing the words "Where relevant, the arbitral tribunal may" with the words "When making a decision on interim measures, the arbitral tribunal may have to", or with similar wording.

50. **Mr. D'Allaire** (Canada) said that his delegation had no objection to the deletion of the paragraph, with the exception of item (v), since it might be relevant, in some circumstances, for the tribunal to discuss the enforcement of interim measures with the parties, particularly given the diversity of ways in which interim measures and their enforcement were dealt with in arbitration laws and the fact that restrictions might apply.

51. **The Chair** proposed that, in order to reflect the comments made, and to avoid the implication that it was incumbent on the tribunal to provide the parties with information on interim measures, the paragraph be reformulated to begin with the words "In the context of an application for interim measures, the arbitral tribunal may have to consider […]" followed by items (i) to (v) or at least item (v).

52. **Mr. Apter** (Israel), expressing support for that proposal, said that while the tribunal was not obliged to provide parties with information on interim measures, it was important that parties were at least aware of the possibility of such measures, particularly since some arbitration laws did not provide for interim measures.

53. **Mr. Castello** (United States of America) said that it might be appropriate to amend the Chair's proposal to include the words "and the parties" following the words "the arbitral tribunal" in order to avoid the implication that it was the responsibility of the tribunal to provide the parties with the information indicated, particularly with respect to enforcement. Given that interim measures were often enforced either at the seat of the arbitration or at the location of the party against whom the measure was

directed, and it might be that none of the arbitrators were from either of those jurisdictions, it would be unrealistic to expect the tribunal to inform the parties regarding enforcement mechanisms available in those jurisdictions.

54. **Mr. Apter** (Israel) wondered whether consideration should be given to the issue of possible conflict between an interim measure ordered by an arbitral tribunal and an interim measure ordered by a court, possibly by including the relationship between the two types of interim measure among the issues that the tribunal might wish to consider.

55. **The Chair** said that the issue of whether an arbitral tribunal would have to comply with a court-ordered interim measure or would be able to consider the matter de novo was complex and might therefore be difficult to address under paragraph 60. However, a reference to the issue could be included, in square brackets indicating it as a possible addition, in the redrafted version of paragraph 60 for the Commission's consideration at a later stage.

56. **Mr. Soweha** (Observer for Egypt), referring to the final sentence of paragraph 59, proposed that the word "usually" be replaced with the word "always", since, in many countries that followed the civil-law system at least, an interim measure was always temporary. He pointed out that a back-translation of "interim measure" as translated in the Arabic text of the draft revised Notes was "temporary measure"; consequently, the translation in Arabic read "A temporary measure is usually temporary […]".

57. **The Chair** expressed concern that such a definition would be too restrictive, since the definition of interim measures varied and the Notes were intended to provide for possible exceptions. While the word "interim" itself implied the temporary nature of such measures, and both article 26 (2) of the UNCITRAL Arbitration Rules as revised in 2010 and article 17 (2) of the UNCITRAL Model Arbitration Law (1985) as amended in 2006 provided that "An interim measure is any temporary measure […]", some aspects of an interim measure might not be temporary, such as an obligation to preserve evidence.

58. **Mr. Soweha** (Observer for Egypt) proposed that, in view of that concern, and since the concept of interim measures was well established and therefore required no definition, the sentence be deleted altogether.

59. **Mr. Snijders** (Observer for the Netherlands) said that, while he agreed that it was unnecessary to set out a definition of "interim measure" in the Notes, it was his understanding of the Commission's earlier discussion that the final sentence of paragraph 59 would be retained pending the Commission's decision, when considering note 20, on whether or not to include guidance on the form and content of awards. The reference, in the second sentence of that paragraph, to the fact that many arbitration laws and rules provided for the possibility of interim measures, together with the accompanying footnote drawing the attention of arbitrators to the relevant provisions of the UNCITRAL Arbitration Rules as revised in 2010 and the UNCITRAL Model Arbitration Law (1985) as amended in 2006, sufficed as guidance on the nature of interim measures. However, it might be useful to highlight that information, and the fact that the enforceability of interim measures was subject to the applicable law or rules, in paragraph 58.

60. **The Chair** said that since the enforceability of interim measures was already referred to in paragraph 60, an additional reference to that issue was unnecessary, However, paragraph 58 could otherwise be modified as proposed.

61. **Mr. Castello** (United States of America) expressed concern about deleting the reference, in paragraph 59, to the temporary nature of interim measures simply because the debate on that issue had not been resolved. It was useful to inform parties that relief in the form of an interim measure was temporary; indeed, it was difficult to envisage a situation in which such a measure would not be temporary; even if an interim measure was incorporated into a final award, it was the award that was permanent rather than the interim measure. While his delegation appreciated the desirability of avoiding absolutes in the Notes, and did not object strongly to the use of the word "usually" if the Commission considered that there might be exceptions to the general rule that interim measures were temporary, he noted that no such qualification was used in the relevant provisions of the UNCITRAL Model Arbitration Law (1985) as amended in 2006 or the UNCITRAL Arbitration Rules as revised in 2010.

The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.

62. **Ms. Magliana** (Observer for the Swiss Arbitration Association) proposed that, as a compromise solution, the final sentence of paragraph 59 be deleted and the words "temporary relief in the form of" be inserted between the words "a party may need to seek" and the words "an interim measure" at the beginning of paragraph 58. Such wording would convey the temporariness of interim measures without making an explicit statement to that effect.

63. **The Chair** said that that proposal might be adequate to address the concern raised by the representative of the United States insofar as it was a preliminary definition of interim measures.

64. **Mr. Bobei** (Observer for Romania) said that the intention of the provisions on interim measures should be to express the nature of such measures rather than to establish a legal definition for the concept, which should be left to arbitration laws and arbitration rules.

65. **Mr. Schöfisch** (Germany) said it was important to bear in mind that the document was not a binding legal instrument but, rather, was intended to provide guidance. On that understanding, his delegation would prefer to retain the phrase "An interim measure is usually temporary in nature", for the reasons already given by other speakers.

However, it could also accept the wording proposed by the observer for the Swiss Arbitration Association, or, if the consensus was to delete the entire sentence, that proposal also.

66. **Mr. Apter** (Israel) expressed support for the comments made in support of retention of the final sentence of paragraph 59 as drafted.

67. **The Chair** wondered whether the wording "An interim measure by nature is temporary" would satisfactorily address the concern raised by the representative of Egypt.

68. **Mr. Möller** (Observer for Finland), endorsing that suggestion, said that it might not necessarily be understood from the phrase as drafted in document A/CN.9/844 that interim measures were only a form of temporary relief and did not have the same impact as a final award; moreover, the word "usually" was confusing.

69. **Mr. Popkov** (Belarus) said that his delegation supported the Chair's suggestion, but could also accept the deletion of the word "usually" in the phrase as drafted, given that that word might give rise to problems of interpretation or confusion with regard to the duration or status of interim measures compared to final awards. His delegation also had no objection to the deletion of the entire sentence.

70. **The Chair** said that it might be useful to move the modified sentence to the beginning of the paragraph. He took it that the Commission wished the secretariat to redraft paragraphs 58-60 on the basis of the comments made

71. *It was so decided*.

(b) Security in connection with interim measures (paragraph 61)

72. **The Chair** asked whether the text in square brackets was necessary given that it addressed a complex issue that had been discussed at length during revision of the Model Arbitration Law and was modelled on the text of article 17 (G) of that Model Law and article 26 (8) of the UNCITRAL Arbitration Rules as revised in 2010.

73. **Mr. Castello** (United States of America) said that it would be useful to retain the bracketed text in order to draw parties' attention to the potential risk of liability in connection with an interim measure, since they might otherwise be unaware of that risk. However, he proposed inserting the phrase "Under the applicable arbitration law or rules," before the words "the party requesting an interim measure may be liable" at the beginning of the first sentence of that text, as such liability required a legal basis.

74. **The Chair** said that, while he supported that proposal, liability for damage caused by an interim measure would not necessarily be dealt with by the applicable arbitration law, but might instead be provided for under procedural law, or in other laws. There might be bases for such liability other than the fact that a request for an interim measure should not have been granted, or that the requesting party was at fault in making the request; for example, if the requesting party ultimately lost the case, even if the granting of the measure had been justified. He wondered whether modification of the proposed wording to read "Under the applicable law" would give the provision sufficiently broad scope.

75. **Mr. Castello** (United States of America) pointed out that the draft revised Notes tended to refer to "the applicable arbitration law" and that his proposal was consistent with that wording, although he acknowledged that paragraph 61 might be an exception requiring reference to other laws.

76. **Ms. Montineri** (International Trade Law Division) said that where a matter was not necessarily covered by the applicable arbitration law, as in the case of interim measures, the draft revised Notes referred to "the applicable law".

77. **Ms. Bensaoula** (Algeria), referring to the phrase "if the arbitral tribunal later determines that […] the measure should not have been granted", said that it was difficult to understand why an arbitral tribunal might accept a request for an interim measure if that request was not justified, or why it might accept a request when the requesting party was not in a position to pay possible costs arising in connection with the interim measure. It was indeed the tribunal's responsibility to ensure that the requesting party was able to pay such costs. Situations in which the tribunal determined that, in hindsight, it should not have granted the interim measure seemed unlikely.

78. **The Chair** said that there were situations in which the arbitral tribunal's granting of a request for an interim measure was justified in the circumstances but the situation subsequently evolved in such a way that the tribunal determined, when issuing the final award, that the party that had requested the measure had been at fault in doing so.

79. **Mr. Waincymer** (Observer for the Moot Alumni Association) said that it was the phrase "in the circumstances then prevailing" that was problematic. Under article 26 (8) of the UNCITRAL Arbitration Rules as revised in 2010, if an interim measure was valid under the circumstances prevailing at the time at which it was granted, the fact that the claimant ultimately lost the case did not ipso facto create a basis for the claimant's liability and thus entitle the respondent to damages. However, under article 26(6) of the Rules, an arbitrator might well determine that the requesting party should undertake to pay for any damage suffered if that party lost the case, and the entitlement to damages thus created would be based solely on the outcome on the merits rather than the circumstances prevailing at the time the interim measure was granted. Paragraph 61 of the draft revised Notes provided similarly for such an undertaking by stating that any kind of security could be required of the party requesting the interim measure; however, the second and third sentences of the paragraph suggested that the discretionary power to grant

such a broad entitlement to damages could not be exercised unless the tribunal was able to prove that the "circumstances then prevailing" were such that the measures should not, in hindsight, have been granted; i.e., the claimant would be liable for costs and damages only in those circumstances. That latter part of paragraph 61 was therefore confusing in that it suggested that the tribunal's scope for discretion with respect to security was limited.

80. **The Chair** said that the language on which the paragraph was based might not be a universal solution, and if reference was to be made to "the applicable law" as the basis for liability, which would in any case encompass the similar provisions of the Model Arbitration Law, the phrase beginning "if the arbitral tribunal later determines that" might be unnecessary. Without it, the second sentence of the paragraph would simply refer to liability under the applicable law without indicating the circumstances under which the liability provisions of that law might apply. He asked whether that solution would address the concern raised in that it would allow arbitrators greater freedom in determining the security that the requesting party would be asked to provide.

81. **Mr. Castello** (United States of America) pointed out that the restriction on the granting of damages at the conclusion of an arbitration as provided for in the Model Law was the outcome of a long and delicate debate during the revision of that Model Law, and if that restriction was removed through elimination of the phrase in question, a party that had requested an interim measure might be liable for damages caused even if that measure should not have been granted. He wondered whether it should instead be clarified that the security that the requesting party was asked to provide should be determined in accordance with the principle stated in the second sentence of paragraph 61.

82. **The Chair** wondered whether there might be situations in which the legal provisions applicable to the determination of security in connection with an interim measure differed from those applicable to the determination, at the end of an arbitration, of costs and damages arising from such a measure.

The meeting rose at 12.30 p.m.

Summary record of the 1002nd meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 1 July 2015, at 9.30 a.m.

[A/CN.9/SR.1002]

Chair: Mr. Schneider (Vice-Chair of the Commission, Chair of Working Group II) (Switzerland)

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

Consideration of issues in the area of arbitration and conciliation (*continued*)

(a) Consideration and provisional approval of revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*) (A/CN.9/826, 832 and 844)

Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*)

Note 13. Documentary evidence (*continued*)

(c) Accuracy of assertions about the provenance of documents (paragraphs 77 and 78) (*continued*)

1. **Mr. Hamamoto** (Japan), referring to paragraph 78, said that the issue of provenance and authenticity applied as much to hard-copy documents as to electronic documents. He therefore proposed that the first sentence of that paragraph be deleted and that the words "If such issues arise" at the beginning of the second sentence be replaced with the words "If there are issues regarding the provenance and authenticity of documents". If it was considered necessary to refer to electronic documents, a sentence could be added at the end of the paragraph to the effect that specific treatment should be given to such documents.

2. **The Chair** said it was important to draw attention to the specific issues that could arise with regard to the provenance and authenticity of electronic documents, particularly in view of the relative ease with which electronic documents could be amended and electronic data could be manipulated. Paragraph 78 should also reflect the fact that some electronic documents could be consulted only in electronic format. It was important, furthermore, to take into account that the extent of arbitrators' technical knowledge varied widely, and that the coming years were likely to bring further technological advances.

3. The issue of the provenance and authenticity of documents raised the more general organizational questions of when and how such issues should be raised, which had already been touched on by the Commission in the context of the raising and settling of claims for damages in connection with interim measures. In that regard, he pointed out that neither the original Notes nor the draft revised Notes made reference to "procedural order No. 1", a document summarizing the procedural rules at the outset of the proceedings, which was a frequently used instrument that had become a standard feature of many arbitrations. However, such procedural orders were increasingly standardized, which limited scope for consultation with the parties; moreover, they were sometimes issued without such consultation. He wondered whether it would be useful to refer to them in the Notes.

4. **Ms. Magliana** (Observer for the Swiss Arbitration Association) said that the most appropriate place to include such a reference would be paragraph 15 of the draft revised Notes. She therefore proposed that a new sentence be inserted after the first sentence of that paragraph, to read along the following lines: "For instance, it is common for arbitral tribunals to summarize the decisions taken at the first procedural meeting in a procedural order setting forth the rules governing the arbitration". If considered appropriate, the Commission could then address the possible need to emphasize the importance of consultation with the parties in that process.

5. **The Chair** said that a cross-reference to that proposed text could be added wherever the Notes addressed issues that should be considered at the outset of proceedings. He took it that the Commission wished to accept the proposals made.

6. *It was so decided*.

(d) Practical aspects of the presentation of evidence (paragraphs 79-83)

7. **The Chair**, drawing attention to paragraph 81, said it was often the case that a joint set of documentary evidence was only discussed at the outset of the proceedings, and subsequently prepared for the hearing. He proposed that paragraph 81 be modified accordingly.

8. *It was so decided*.

9. **Mr. D'Allaire** (Canada), referring to the words "a report from a counsel or an expert" in paragraph 83, said that caution should be exercised in using the word "expert", which could lead to confusion. While note 15 set out the concept of "expert witnesses", who provided opinions, paragraph 83 dealt with the simple presentation of evidence rather than the presentation of expert opinions, "expert" being used in a broad sense. Paragraph 54 of the original version of the Notes avoided confusion in that regard by using the words "person competent in the relevant field". With that in mind, it might be useful to amend the wording of paragraph 83, unless it was felt that the word "expert" reflected common practice in that context. In Canada, if the presentation of evidence by an expert was necessary, that expert was required to prove his or her credentials, and might be cross-examined.

10. **The Chair** said that the type of evidence in question could be presented either by specifically appointed experts or as part of expert or factual testimony, and the approach taken would depend on whether the evidence was complex, voluminous or controversial. It would therefore be

undesirable to formalize any one particular approach, since practice varied.

11. **Mr. Castello** (United States of America), endorsing that view, said that if an expert presented a summary report, that would not preclude the various ancillary procedures referred to by the representative of Canada, whereby, for example, the qualifications of that expert could be reviewed. As he understood it, paragraph 83 simply indicated that where there was voluminous evidence, such a report could be an effective way of presenting that evidence in such a way that neither the tribunal nor the parties became bogged down in unnecessary detail.

12. **The Chair** proposed that, since it was important to highlight the variety of ways in which evidence could be dealt with, and in order to reflect the proposal made by the representative of Canada, attention be drawn to the possibility that specific procedures might be required in certain circumstances.

13. *It was so decided*.

Note 14. Witnesses of fact

a) Identification of witnesses; contact with the parties (paragraphs 84-88)

14. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration), drawing attention to the references to "witness statements" in paragraphs 84 and 86, said that while it could be inferred from those paragraphs what witness statements were, it would be useful to include a definition of such statements immediately before the final sentence of paragraph 84, perhaps drawing language from the International Bar Association Rules on the Taking of Evidence in International Arbitration (articles 4 and 5 (b)), to read along the lines of "A witness statement is a written document sufficient to serve as that witness's evidence in the matter in dispute."

15. **Mr. Jacquet** (France) said that while such a definition would be useful, he wondered whether it would be sufficiently flexible, particularly in the context of investment arbitration. For example, opinions provided by legal experts on specific issues, while possibly falling within the scope of paragraph 83, bore no relation to witness statements. In practice, however, the authors of such legal opinions were frequently called on as witnesses at the hearing in order to verify the robustness of the contents of those opinions. The term "witness statement" was therefore somewhat ambiguous. If the Notes set out a strict definition of that term, such expert opinions would not be considered witness statements, which would raise the question of how to call upon legal experts to defend their opinions. That should be taken into account in considering the proposal made.

16. **The Chair** said that the lack of clarity with respect to the term "witness statement" was compounded by the use of the problematic term "expert witness" not only in the Notes but also in the UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006, as well as by the fact that an expert gave an opinion or produced a report rather than providing a witness statement; moreover, that opinion might be legal or technical, as alluded to in paragraph 83 of the draft revised Notes. While it might be possible to clarify that terminology when taking up consideration of the draft text of note 15, it was likely to be difficult to avoid or eliminate it, given current practice, despite its conceptual imprecision. However, the title of draft note 14 would not require amendment and the text proposed under that note was clearly limited to referring to witnesses of fact. The proposed definition of "witness statement" was measured and would be useful under note 14 (a). It was important that the Notes highlight that testimony could be provided in various forms other than that of witness statements, which in some arbitrations had become burdensome because they were increasingly long and often became a separate form of written submission. He suggested that the secretariat draft a summary explanation of what a witness statement was, along the lines proposed and taking into account any specific drafting recommendations that delegations wished to make, as part of its work following the session.

17. **Mr. D'Allaire** (Canada) said that his delegation supported the inclusion of a definition of "witness statement", but that definition should include the requirement that witness statements be signed by the witness.

18. **The Chair** said that while it was important to draw attention to possible requirements with regard to the form such statements should take, such requirements varied and there was no established standard.

19. **Mr. D'Allaire** (Canada), drawing attention to the first sentence of paragraph 86, said that the wording of that sentence was a little too definitive, and might not accurately reflect practice. He therefore proposed that the phrase "it is generally accepted that these statements need not be repeated orally" be deleted and that the first part of the sentence be combined with the second sentence of the paragraph, to read "Where written witness statements are presented, they are often accepted as the witnesses' testimony and only short direct testimony or merely a confirmation of the written statement is required."

20. **The Chair** said that the idea that statements need not be repeated orally was useful and should be retained, but could perhaps be qualified by amending the wording to read along the lines of "it is generally accepted that these statements need not be repeated in their entirety".

21. **Mr. Castello** (United States of America) proposed that the words "or updating" be added after the word "confirmation" in the second sentence of paragraph 86, since, in his experience, it was often the case that several months could pass between the time of submission of the witness statement and the time at which the witness was heard.

22. *It was so decided*.

23. **Mr. Malhotra** (India) proposed that the third sentence of paragraph 86 be redrafted to clarify that the word "uncontroversial" referred to the testimony rather than the witness.

24. *It was so decided*.

25. **The Chair**, drawing attention to paragraph 87, said that it might be unnecessary for a written witness statement to refer to all documents upon which it relied; it sufficed, and indeed was more important, that the statement identify such documents. He therefore suggested that the paragraph be modified accordingly.

26. *It was so agreed*.

27. **Mr. Soweha** (Observer for Egypt), drawing attention to the first sentence of paragraph 88, said it should be clarified that the words "a witness" in "the nature of the contact a party or its representative is permitted to have with a witness" referred not to any witness but the party's witness — in line with the reference, in the third sentence of the same paragraph, to "pre-testimony contact between a party and its witness" — by replacing the word "a" with the word "its".

28. **The Chair** said that that point also raised the questions of the extent to which a party was permitted to contact a witness of the other party, and the extent to which a party was required to grant access to its own witnesses at the request of the other party. Contact with persons that might or might not become witnesses was also an issue that sometimes arose. While those questions did not arise frequently, it might be useful to address them in paragraph 88 by using broader wording.

29. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) said that the content of the final (fifth) sentence of paragraph 88 appeared to be very similar to that of the penultimate sentence, and consequently rendered the latter, and possibly the third sentence also, somewhat redundant. It might also be read as overstating that contact with witnesses prior to their giving testimony was always or almost always acceptable.

30. **The Chair** said the fact that the first, fourth and fifth sentences of paragraph 88 dealt with the issue of contact with witnesses in a slightly different and possibly contradictory manner might be the result of earlier discussion of various aspects of that issue that had been highlighted as requiring attention. Before requesting the secretariat to redraft those passages, it would be helpful to consider the situations that should be addressed. In the practice of many States, especially those with civil-law systems, the parties were not permitted to contact witnesses or potential witnesses before those witnesses had testified, whereas in international arbitration it was widely accepted and in some cases even provided for specifically that such prior contact was admissible. However, there might be aspects of such contact to which attention should be drawn, thus giving the subject broader treatment. In particular, the question of preparation of witnesses, specifically the extent to which counsel briefed witnesses and rehearsed their testimony, which had become a subject of increasing concern and discussion, had not been addressed sufficiently.

31. **Mr. Castello** (United States of America) said that while he understood the undesirability of two sentences addressing the same point, namely the fourth and fifth sentences of paragraph 88, and while it might be possible to combine those two sentences, the fifth sentence had been included in the draft revised Notes on the basis of paragraph 67 of the original Notes. However, since the adoption of that original version there had been considerable change in practice with respect to contact with witnesses. For example, even in jurisdictions where pre-testimony contact between counsel and witness was still prohibited in civil litigation, the Bar rules had been adjusted to allow such contact in the case of arbitration. It would therefore be useful to expand paragraph 88 to draw attention to that change. In doing so, however, it might be appropriate to consider whether it was accurate to state that pre-testimony contact with witnesses was "widely accepted" in international arbitration.

32. **Ms. Magliana** (Observer for the Swiss Arbitration Association) said that the first and final sentences of paragraph 88 were somewhat at odds, the first suggesting that it was for the tribunal to define the nature of the contact permitted between parties and witnesses whereas the final sentence gave the impression that pre-testimony contact was usually permitted. She therefore suggested that the preparation of testimony as referred to in the final sentence be linked to the ambit of the tribunal's power in that regard. The paragraph should also reflect the variation between civil-law and common-law traditions with respect to pre-testimony contact.

33. **The Chair** wondered whether it was necessary to go beyond indicating the change in practice in international arbitration, as proposed by the United States representative, to address the powers of the tribunal with respect to contact with witnesses, bearing in mind that it might also be necessary to develop the provision with respect to the preparation of witnesses. He suggested that paragraph 88 be expanded to reflect the various comments made, for further consideration by the Commission.

34. *It was so agreed*.

(b) Manner of taking oral evidence of witnesses (paragraphs 89-93)

35. **The Chair** proposed that paragraph 90 be modified to first indicate who would question the witnesses and then refer to the control exercised by the tribunal over the hearing of those witnesses.

36. *It was so agreed*.

37. **Mr. Castello** (United States of America) said that it would be useful to amend paragraph 92 to provide that where witnesses were not allowed in the hearing room, they should also not be given access to contemporaneous transcripts of the hearings.

38. Drawing attention to the penultimate sentence of the same paragraph, he said that counsel or arbitrators unfamiliar with the practice of allowing witnesses who were representatives of a party to be present in the hearing room might wonder why a separate rule might apply in such cases. It would therefore be helpful to elaborate that sentence in order to highlight that sequestration of a party representative could limit that party's ability to present its case.

39. A further question that should be addressed was whether a witness of fact could discuss his or her case or testimony during a break in that testimony, which in some cases was overnight, regardless of the rule that applied to the witness' presence in the hearing room before or after testimony was given. To that end, it might be useful to add a sentence at the end of the paragraph along the lines of "In any event, tribunals often provide that fact witnesses may not discuss the case or their testimony with others during any breaks that occur in their testimony."

40. **Mr. Balaš** (Czech Republic) pointed out that article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration provided that, except in certain circumstances, hearings should be public. In the light of that provision, he wondered how it was possible to avoid witnesses' hearing the testimony of other witnesses in the case of such hearings.

41. **The Chair** said that that point raised the general question of the way in which the Notes dealt with the Rules on Transparency. While a specific reference to the Rules was made in the context of confidentiality, namely the footnote to paragraph 53 of the draft revised Notes, it might be problematic to draw attention to every instance in which there was a difference between ordinary commercial arbitration and investor-State arbitration to which the Rules applied. As a solution, he proposed that that footnote be revised to explain that the Rules could have an impact on other aspects of the proceedings, including hearings.

42. *It was so agreed*.

43. **Mr. Jacquet** (France), referring to the comment made by the representative of the Czech Republic, pointed out that witnesses were not members of the public and were bound by specific rules. There was therefore no possibility of conflict with the Rules on Transparency. Paragraph 92 was already well drafted and presented clearly the options available to a tribunal with regard to the presence of witnesses in the hearing room. It should therefore not be amended except to incorporate text clarifying the special treatment of the presence of parties' representatives, as proposed by the United States representative.

44. **The Chair**, concurring that that issue should be highlighted, pointed out that the hearing of representatives of a party was in fact addressed in paragraph 96, which might therefore be the best place for more detailed guidance.

45. **Mr. Möller** (Observer for Finland), endorsing the proposals made by the representative of the United States, asked whether the proposed provision that witnesses should not communicate with others when their testimony was interrupted would apply also to contact with party representatives.

46. **The Chair** said that the proposal concerned any private communication with witnesses, including between party representatives and witnesses, during the giving of testimony.

47. **Mr. Möller** (Observer for Finland) said that the issue could be more delicate in the case of party representatives, who in some jurisdictions would not expect to be sequestered.

48. **Ms. Bensefa** (Algeria), supported by the Chair, proposed that the Notes provide that where witnesses gave testimony remotely, such as via videoconference, they should be subject to the same rules as witnesses who were physically present in the hearing room.

49. **Mr. Castello** (United States of America), expressing support for that proposal, said that the possibility of hearing or cross-examining witnesses remotely could also be mentioned in paragraph 16 given that that paragraph already provided for the holding of procedural meetings remotely via technological means of communication.

50. **Ms. Magliana** (Observer for the Swiss Arbitration Association) proposed that the words "and thereafter" be deleted from the first sentence of paragraph 92, the remainder of the paragraph going on to address the various possible approaches to the presence of witnesses in the hearing room before and after they had testified, since the possibility of allowing witnesses to remain after testifying was already dealt with later in the paragraph.

51. **Mr. Castello** (United States of America) said it was his understanding that those words were intended to draw attention to the general rule that the presence of witnesses in the hearing room before they gave testimony was not permitted, the reasons for which were given in the second sentence of the paragraph. It would therefore be useful to retain that meaning.

52. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) said that, as her delegation understood it, the general rule stated in the paragraph was that, while approaches might vary, witnesses should be allowed in the hearing room only when testifying. Her delegation therefore supported the proposed deletion of the words "and thereafter".

53. **The Chair** said that it was important to provide for a variety of possible situations. For example, the arbitral tribunal might be concerned about the impact of the presence of witnesses on the testimony provided by other witnesses, irrespective of whether those other witnesses had already testified or not; other possible approaches included allowing witnesses to be present in the hearing room at all times or questioning witnesses collectively, although the latter possibility might be better addressed under paragraph 90, on the manner in which witnesses were heard.

54. He suggested that the secretariat redraft the paragraph in the light of the comments and proposals made, for the Commission's further consideration.

55. *It was so agreed*.

(c) Order in which the witnesses will be called (paragraphs 94 and 95)

56. **Mr. Greenberg** (Australia), drawing attention to the words "Each party might be invited to suggest the order in which it proposes the witnesses to be examined" in the third sentence of paragraph 94, said that wording along the lines of "the order in which it proposes to have its own witnesses testify" might reflect usual practice more accurately.

57. **The Chair**, responding to the comment on paragraph 94, said that approaches might vary with regard to the question of whether it was the party presenting the witnesses or the cross-examining party that determined the order in which those witnesses were called. That determination was generally a tactical matter and in practice was likely to depend on the availability of the witnesses.

58. **Mr Greenberg** (Australia) said that, while he agreed with those comments, in his experience it was usually the party calling the witnesses that chose the order of their appearance, precisely for the reason that that party was in the best position to determine their availability.

59. Turning to paragraph 95, he said that that paragraph was somewhat inconsistent with paragraph 86 in that, whereas the latter reflected the principle that a written witness statement was commonly regarded as evidence-in-chief, paragraph 95 slightly gave the undesirable impression of providing for witnesses' giving new evidence during an oral examination-in-chief. The paragraph should therefore be reviewed.

60. **The Chair** said that the opening part of that paragraph simply highlighted the possibility that the tribunal itself might question witnesses. However, the question of the extent to which issues raised in witness statements could be raised again and the extent to which new evidence could be presented as part of oral testimony warranted further consideration. The presentation of new evidence might be necessary if, for example, there were new developments in the case. On the one hand, it was undesirable to forgo the advantage of witness statements, which avoided the need for oral repetition of testimony, but on the other hand it was undesirable to rule out the updating of the testimony or the possibility of the tribunal's hearing the witness in his or her own words, which gave the witness the opportunity to explain important issues without being constrained by cross-examination. It might be difficult to strike a balance between those considerations.

61. **Mr. Jacquet** (France), supported by Mr. D'Allaire (Canada), said that it would be useful to point out in the final sentence of paragraph 95 that re-examination of the witness should be limited to addressing the issues raised during cross-examination. Moreover, in the interests of equality of the parties, the cross-examining party should also be allowed to re-examine the witness. A sentence to that effect should be added to the paragraph.

62. **The Chair**, supported by Mr. Möller (Observer for Finland), said that re-examination by the cross-examining party was rare in practice, since balance was normally considered to be achieved by re-examination by the party calling the witness, although in some cases it might be considered necessary in the light of an unexpected development concerning the testimony or a new aspect revealed during cross-examination. Consequently, while the possibility of such re-examination could be mentioned, as well as the possibility for the arbitral tribunal to question the witness further, care should be taken not to formalize such an approach.

63. **Mr. Jacquet** (France) said that a possible solution would be to delete the final sentence of paragraph 95, thus removing the reference to re-examination altogether. However, if that reference was retained, the paragraph should provide that both parties be given an opportunity to re-examine the witness.

64. **The Chair** suggested that the final sentence of paragraph 95 be redrafted to provide for the possibility, following re-examination by the party calling the witness, of further questioning, depending on the circumstances.

65. **Mr. Greenberg** (Australia), expressing support for that suggestion, proposed the addition of a short sentence to that effect, providing also for the possibility of further questioning by the tribunal.

66. **Mr. Malhotra** (India) said that in India and perhaps in other common-law countries, the practice was that re-examination was permissible but only in relation to issues which had arisen during cross-examination. The final sentence of paragraph 95 should be retained, with the addition of wording to that effect.

67. **Mr. Möller** (Observer for Finland) said that his delegation was satisfied with the text as it stood but would accept its modification as proposed. More general language would also provide for the possibility of further questioning by the arbitral tribunal.

68. **The Chair** took it that the Commission wished to modify paragraph 95 as proposed.

69. *It was so decided*.

70. **The Chair** suggested that, in the light of the discussion of paragraphs 94 and 95, the words "and questioned" be added at the end of the subheading of section (c) of the draft note.

(d) Hearing representatives of a party (paragraph 96)

71. **Mr. Castello** (United States of America) expressed concern that the phrase "whether statements from such persons may be submitted and considered" in the final

sentence of paragraph 96 suggested that persons in any way related to a party might be prohibited altogether from submitting statements, which was inconsistent with both the first sentence of the paragraph and with general practice. The phrase should therefore be deleted.

72. **The Chair**, expressing support for those comments, added that even in legal systems in which special status was given to persons related to a party, those persons were not prohibited from appearing before a tribunal. The wording "persons in any way related to a party" was in fact too broad in the context of paragraph 96, since it might refer also to legal persons, and the status of the persons referred to in parentheses in the final sentence was unclear. Furthermore, the second sentence of the paragraph should refer not only to arbitration rules but also to arbitration practice, since many arbitration rules did not provide for the hearing of representatives of a party as witnesses.

73. He took it that the Commission wished to modify the paragraph in order to clarify the meaning of "persons in any way related to a party", to include a reference to arbitration practice in the second sentence and to delete the phrase indicated by the United States representative as proposed.

74. *It was so agreed*.

(e) Non-appearance of witnesses (paragraph 97)

75. **Mr. Castello** (United States of America) said that if a witness failed to appear at the hearing, the circumstances would be known and the tribunal would certainly be able to consider whether to take that witness' statement into account. What the paragraph omitted to provide for was consideration of the weight that might be given to that statement. He therefore proposed that the words "under what circumstances" be replaced with the words "what weight may be given to it".

76. **The Chair** asked whether the Notes should also address the possible actions that might be taken by the tribunal in such cases, such as inviting the parties, in their post-hearing submissions, to identify the elements with respect to which they had relied on the testimony of the witness so that the tribunal could determine whether that testimony was relevant to its decision and, if so, schedule a new hearing of that witness. The words "under what circumstances" might have been intended to allow the tribunal flexibility in determining how to proceed in such cases. That point could be clarified.

77. **Mr. Apter** (Israel) said that his delegation supported both the proposal made by the representative of the United States and the comments made by the Chair. It should be made clear, particularly to the parties, that non-appearance of a witness would entail consequences, even if those consequences were not determined by the tribunal in advance.

78. **The Chair** suggested that the paragraph be redrafted in the light of the comments made.

79. *It was so agreed*.

The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.

Note 15. Experts and expert witnesses

Paragraphs 98 and 99

80. **The Chair** said that, in its discussion of note 15 of the draft revised Notes, the Commission should bear in mind the issues already raised with regard to the terms "expert" and "expert witness". Drawing attention to the reference, in paragraph 98, to experts engaged by the parties, he pointed out that the translation of "expert witnesses" and "party-appointed experts") in the French version of that paragraph would need to be reviewed in the light of those issues.

81. **Mr. D'Allaire** (Canada) proposed that the heading of note 15 be amended to refer only to "expert witnesses", which covered both experts engaged by the parties and experts appointed by the arbitral tribunal.

82. **The Chair** said that the proposed change would necessitate modification both of the headings of sections (a) and (b) of the note and of paragraph 98, which distinguished party-appointed experts from experts appointed by the arbitral tribunal. Moreover, it was precisely the ambiguity of the term "expert witness", particularly in the French version of the text, that had already raised concerns, since experts who appeared before the tribunal to present an expert report or opinion could not necessarily be referred to as witnesses. It might therefore be more appropriate to retain the term "experts" in the heading.

83. **Mr. D'Allaire** (Canada) said that expert witnesses were understood to be individuals who provided an opinion on a matter falling within their area of expertise, as opposed to witnesses, who gave evidence concerning facts of which they had personal knowledge or had become aware. Note 15 dealt with the former. The question of who appointed such experts was irrelevant, since it did not affect their role, which was to provide an expert opinion. However, his delegation was open to other suggestions with respect to the heading of the note.

84. With regard to the French translation of "expert witness", he proposed the term "témoin expert", which was a used in Canada and circumvented the difficulties posed by the rendering "experts agissant en qualité de témoins".

85. Paragraphs 98 and 99 should indicate that a report presented by an expert should detail the expertise of that expert. In practice, experts often provided a copy of their curriculum vitae and might also provide information about the most recent situation in which they had been required to provide an expert opinion.

86. **The Chair** said that section (c) of the draft note would be the most appropriate place to include a requirement that an expert provide information on his or her qualifications and experience. To some extent, that requirement applied both to tribunal-appointed experts and to party-appointed experts. Section (c) dealt only with the terms of reference of experts appointed by the tribunal,

which in most cases were discussed with the parties and indicated, inter alia, the information and documentation that the expert would receive. The Commission might wish, when taking up its consideration of that section, to consider expanding those provisions to address the terms of reference of party-appointed experts and possible requirements with respect to the content of reports presented by such experts.

87. **Mr. Schöfisch** (Germany) said that his delegation would prefer the heading of note 15 to remain as drafted, as it shared the understanding that an expert witness was appointed by the party and an expert was appointed by the arbitral tribunal.

88. **Mr. Möller** (Observer for Finland) said he agreed that that distinction should be preserved, since the same distinction was made in the UNCITRAL Arbitration Rules as revised in 2010, particularly article 29 on "experts appointed by the arbitral tribunal".

89. **Mr. Özsunay** (Turkey) said that the distinction should be retained in order to avoid confusion, particularly among inexperienced arbitrators and judges in civil-law jurisdictions.

90. **Ms. Montineri** (International Trade Law Division) said that the difference between the terms "expert" and "expert witness" had already been discussed during the revision of the UNCITRAL Arbitration Rules in 2010, and that discussion was reflected in the relevant *travaux préparatoires*, which could be referred to for clarification.

91. **The Chair** suggested that the Commission consider the remainder of the draft note before further reviewing the terminology used.

(a) Expert opinion presented by a party (expert witness) (paragraphs 100-104)

92. **The Chair** said that, bearing in mind the discussion of the draft note thus far, and setting aside the possible modification of the heading of section (a) of draft note 15, the Commission might wish to clarify not only the role of an expert engaged by a party but also the inconsistent terminology used in that section, which referred not only to "expert opinion" but also to "report", "expert evidence", "expert reports" and "expert witness statements". He pointed out that the nature of a party-appointed expert's contribution to the arbitration differed from that of the contribution made by a witness of fact in that it was based on specialized knowledge, not necessarily fact, although there might be factual elements in the expert's report.

93. **Mr. Schöfisch** (Germany), concurring that the terminology used should be clarified, said that the term "expert opinion" was the most appropriate and should be used consistently.

94. **The Chair**, referring to the final sentence of paragraph 100, said that in view of the usefulness of identification by parties' experts of points of agreement and disagreement, it would be helpful to set out further information on that practice, since the tribunal might need to provide more precise guidance with regard to the presentation of those points.

95. *It was so agreed*.

96. **Ms. Yasseen** (Observer for the Swiss Arbitration Association), referring to paragraph 101, wondered whether it was understood, in cases where the parties agreed on a single joint expert, who would pay that expert.

(b) Expert appointed by the arbitral tribunal (paragraphs 105-109)

97. **Mr. Apter** (Israel) proposed the addition of a provision to the effect that arbitral tribunals should consider the possible effect that appointment of an expert might have on the efficiency of the arbitration process, given that it could prolong the proceedings.

98. *It was so agreed*.

99. **Mr. Greenberg** (Australia), drawing attention to the second sentence of paragraph 106, proposed the replacement of the word "may" with the words "will usually" in order to reflect usual practice.

100. **The Chair**, expressing support for that proposal, said that it was useful to provide the parties with an opportunity to comment on the qualifications of a proposed expert so that they could assist the tribunal in deciding whether or not to appoint that expert and in defining clearly the issues that the expert should address.

101. **Mr. D'Allaire** (Canada) said that paragraph 109 drew attention to the fact that an expert's opinion was treated as evidence by the arbitral tribunal, which explained the use of the term "expert evidence" in paragraphs 102 and 104, although his delegation agreed that the terminology used in draft note 15 should be made consistent.

102. Where a tribunal-appointed expert had presented evidence, the parties would normally be given an opportunity to present a submission in relation to the expert's report. Since the word "comment" would not usually be used to refer to such a submission, and could therefore be misleading, he proposed that it be replaced with the words "make submissions".

103. The paragraph should be further revised to avoid the impression that the views of the parties could be expressed only through a submission and that the examination of the expert by the parties was not allowed. The possibility of such examination should be provided for.

104. **The Chair** said he agreed that the parties should be given the opportunity, depending on the circumstances, to question the expert. He took it that the Commission wished to modify paragraph 109 accordingly.

105. *It was so decided*.

106. **The Chair**, referring to the proposal to replace the word "comment" with the words "make submissions", said that it was not necessarily the case that parties were required to express their views on the expert's report in a

formal submission or in any other particular form. He noted that there was no support for that proposal.

107. With regard to the comment that an expert's opinion was treated as evidence by the arbitral tribunal, he wondered whether that was always the case and whether there was a difference in that regard between an opinion presented by a legal expert and an opinion presented by a technical expert.

108. **Mr. Jacquet** (France) said that there was indeed a great difference between legal and technical experts: while the former were called upon to explain issues concerning the factual context of the arbitration, legal experts addressed matters relating directly to the determination and interpretation of the applicable law and rules. That role was far from that of giving evidence. Caution should therefore be exercised in using the term "expert evidence".

The meeting rose at 12.30 p.m.

Summary record of the 1003rd meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 1 July 2015, at 2 p.m.

[A/CN.9/SR.1003]

Chair: Mr. Schneider (Vice-Chair of the Commission, Chair of Working Group II) (Switzerland)

The meeting was called to order at 2.15 p.m.

Consideration of issues in the area of arbitration and conciliation (*continued*)

(a) Consideration and provisional approval of revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*) (A/CN.9/826, 832 and 844)

*Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*)*

*Note 15. Experts and expert witnesses (*continued*)*

1. **Mr. Popkov** (Belarus), referring to note 15 in general, said that, with the purpose of the Notes in mind, the Commission should take a cautious and balanced approach to introducing new terminology and thus altering concepts, particularly in view of the differences in practice between legal systems. In Belarus, for example, an expert opinion was a form of evidence; a means of explaining factual circumstances that required specialist knowledge. It was important to have a clear idea of how the terminology used to refer to experts and expert opinions would be interpreted and what impact it would have on arbitral proceedings, by assessing that terminology from a range of viewpoints. In particular, the term "expert witness" would need to be reviewed in relation to the term "expert appointed by the arbitral tribunal".

2. **The Chair** said that the general approach to the Notes was indeed to ensure that they reflected the diversity of practices.

*(b) Expert appointed by the arbitral tribunal (paragraphs 105-109) (*continued*)*

3. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) proposed that the reference, in paragraph 108, to contact between experts and parties be expanded by adding a sentence to the effect that the arbitral tribunal might instruct its expert to observe due process in its communication with the parties.

4. **The Chair** said that the extent to which tribunal-appointed experts were permitted to engage in ex parte communication was unclear, and depended on the jurisdiction concerned. It might therefore be inadvisable to introduce restrictions on such communication. In some ways, parties were in any case protected from any negative consequences of ex parte communication by the proceedings before the tribunal and by the fact that they were entitled to comment on the expert's report.

5. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) said that the intention of her proposal was not to focus on ex parte communication but rather to provide that experts should raise specific issues with both parties in order to give each party the opportunity to respond.

6. **The Chair** suggested that the Commission consider the issue further at a later stage.

7. *It was so agreed.*

(c) The expert's terms of reference (paragraphs 110-111)

8. **The Chair** proposed that paragraph 110 be expanded to provide that the remuneration of experts should be included in their terms of reference. Experts should provide a budget for their fees, and the arbitral tribunal should not be held liable if the final fees exceeded that budget.

9. *It was so agreed.*

10. **Mr. Castello** (United States of America) asked whether section (c) applied only to experts appointed by the tribunal, given that reference was made only to experts and not to expert witnesses. His understanding was that it applied to party-appointed experts also, in which case the subheading should be amended to read "Terms of reference for experts or expert witnesses".

11. **The Chair** said that the section was intended to apply both to tribunal-appointed experts and to party-appointed experts; however, it did not address the latter sufficiently. While some aspects of the terms of reference of party-appointed experts were not the concern of the tribunal but, rather, internal matters to be dealt with by the party concerned, guidance could be provided on the content of reports presented by such experts. In that regard, he recalled the suggestion made at the previous meeting that the report presented by an expert should refer to that expert's qualifications and experience.

12. **Mr. Castello** (United States of America) said that there appeared to be nothing in paragraphs 110 and 111 that applied solely to tribunal-appointed experts; however, the applicability of those paragraphs to both categories of expert should be clarified. Given that the section was intended simply to explain why terms of reference were useful, it might not be necessary to establish how such terms of reference should be presented or the specific information that they should set out.

13. **The Chair** pointed out that terms of reference were usually established for tribunal-appointed experts, typically in consultation with the parties, whereas terms of reference for party-appointed experts, if established, would not normally be disclosed. If section (c) was to deal only with tribunal-appointed experts, it should refer to such

consultation with the parties, and could also refer to the expert's qualifications and experience. However, if it was to apply to both types of expert, a number of additional points would need to be elaborated on in relation to, inter alia, the manner in which the terms of reference were drawn up and the extent to which the relationship between the expert and the tribunal was transparent.

14. **Mr. Schöfisch** (Germany) said he shared the understanding that terms of reference would normally be established only for a tribunal-appointed expert and that the arrangements between a party and its expert would not be disclosed. However, in note 15 (c), "expert" might well be understood as referring to both types of expert, particularly since the concept of "expert witness" did not exist in all legal systems, and approaches to the issue varied from one legal system to another. Those differences should be reflected and the distinction between tribunal-appointed experts and party-appointed experts in the context of paragraphs 110 and 111 should be clarified.

15. **The Chair** recalled that the Commission had already highlighted, during its consideration of paragraphs 98 and 99, the possible need to elaborate on the terms "expert" and "expert witness". In practice, it was usually the parties that would first present an expert; the tribunal might appoint its own expert at a later stage, if necessary. Any "terms of reference" established between parties and their experts, while not necessarily referred to by that term, would be similar to the terms of reference prepared for a tribunal-appointed expert with respect to the information that they set out, such as the issues to be addressed by the expert and the material to be provided to him or her.

16. **Mr. Castello** (United States of America) said that, regardless of whether "terms of reference" or an alternative term was used, paragraphs 110 and 111 provided useful guidance that applied both to tribunal-appointed experts and to party-appointed experts not only with regard to their terms of reference but also with regard to the information set out in the expert's report, namely the questions on which the expert was to provide clarification, the documents to which he or she would have access in order to prepare the report and the method that the expert used in arriving at his or her conclusions. That point should be clarified.

17. **The Chair** suggested that, if the provisions were clarified as suggested, the words "terms of reference" be replaced throughout with the word "mandate" and additional wording be added to indicate that the mandate of a tribunal-appointed expert usually took the form of terms of reference. He pointed out in that regard that the mandate of a party-appointed expert was usually reflected in that expert's report, whereas the terms of reference of a tribunal-appointed expert were typically a separate document.

18. **Mr. Jacquet** (France) said that it would be preferable for paragraphs 110 and 111 to apply only to tribunal-appointed experts given that the respective mandates of tribunal-appointed experts and party-appointed experts could not be treated in the same way; whereas it was important that the tribunal give its expert a specific mandate, the mandate of a party-appointed expert was strictly a matter for the party and its expert. However, if the provisions were to apply to both categories of expert, they should highlight, as suggested, that the mandate of tribunal-appointed experts would take a different form, and should also address transparency in communication between the tribunal and the parties, remuneration of party-appointed experts and the method used by party-appointed experts to arrive at their conclusions.

19. **The Chair** said that the suggested expansion of the provisions to apply to all experts might necessitate amendment of the subheading to refer both to party-appointed experts and to tribunal-appointed experts; alternatively, the provisions could be reorganized under two separate headings.

20. **Mr. Schöfisch** (Germany), endorsing the comments made by the representative of France, said that his delegation understood paragraphs 110 and 111 to apply only to tribunal-appointed experts, particularly since the points to be addressed by the expert and the time schedule to which he or she would be committed, as referred to in paragraph 110, would be determined by the tribunal only with respect to its own expert.

21. Since it was hoped that the Commission would be able to adopt the revised Notes at its next session, and given that only a limited amount of time would be available for further discussion at that session, it was important to resolve as many outstanding questions as possible and to provide the secretariat with clear instructions. He suggested that, if a large number of issues were left unresolved, Working Group II consider those issues further and prepare a final version of the draft revised Notes to be considered by the Commission within the shortest possible time at its next session.

22. **The Chair** said that that suggestion would have to be considered when discussing future work. While he understood the concern expressed, particularly since some of the unresolved issues were controversial, a number of the issues raised had not been considered previously and it would be risky to attempt to resolve them in haste, since any decisions thus reached might later be regretted.

23. **Mr. Selivon** (Observer for the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry), endorsing the comments made by the representatives of France and Germany, expressed support for the view that note 15 should reflect the differences in practice between legal systems with regard to tribunal-appointed and party-appointed experts and that section (c) of the note should distinguish between the two types of expert.

Note 16. Other evidence

Paragraph 112

24. **Mr. Snijders** (Observer for the Netherlands) asked whether the words "called upon" in paragraph 112 might

be interpreted as indicating that the tribunal could assess physical evidence other than documents only when requested by a party to do so, thus precluding the possibility that the tribunal might decide on its own motion to assess such evidence. Such an interpretation should be avoided.

25. **The Chair** said that that comment had been noted.

(a) Physical evidence (paragraph 113)

(b) Inspections of site, property or goods (paragraphs 114-117)

26. **Mr. Soweha** (Observer for Egypt), referring to paragraph 113, wondered whether the draft revised Notes should address situations in which goods or merchandise to be inspected by the arbitral tribunal were in the possession or under the control of a person or entity not involved in the arbitration proceedings, since in such cases access to the goods or merchandise in question might be refused. In Egypt, for example, there had been a case in which the merchandise to be inspected had been in the possession of the State and the arbitral tribunal had had to issue an order in order to gain access to that merchandise. That process had delayed the proceedings considerably.

27. **The Chair** said that, while such situations could indeed pose difficulties and could also arise in relation to access to sites, little guidance could be provided beyond drawing attention to the possibility of such difficulties, since the tribunal had no authority over such third persons. However, where a party to the proceedings had some degree of control over the third person in question, such as in the case of a subcontractor, the tribunal might be able to rely on that party to arrange the necessary access.

28. Drawing attention to the reference to virtual inspection in paragraph 114, he proposed that the word "desirable" be replaced with the word "adequate", since the question was whether such an inspection would be sufficient in a given case.

29. *It was so decided.*

Note 17. Hearings

(a) Decision whether to hold hearings; submissions in relation to hearings (paragraphs 118-121)

30. **Mr. Greenberg** (Australia) proposed that, in paragraph 118, the words "and laws" be inserted following the words "Arbitration rules".

31. *It was so decided.*

32. **Mr. Castello** (United States of America) said that in paragraph 121, the reference in parentheses to procedural issues was potentially confusing in that the paragraph might be understood as referring not only to hearings but also to procedural meetings, which were already dealt with in paragraphs 13-16 of the draft revised Notes, as was the possibility of holding procedural meetings remotely (paragraph 16). It was therefore unclear whether there was an intentional link between the two paragraphs. While some procedural issues might be very important, it was his understanding that paragraphs 118 to 121 essentially dealt with hearings that concerned substantive issues. If such a hearing was to be held remotely, the factors to be considered might include the question of whether witnesses were to be cross-examined or whether the hearings would involve oral argument alone. Such factors should be included in paragraph 121.

33. **The Chair** said he agreed that the examples given in parentheses in paragraph 121 were not illustrative of factors influencing the decision whether to hold hearings in person or remotely; the importance of the issues at stake did not necessarily influence that decision. An alternative example might be the need for the physical presence of witnesses; he recalled, however, that it had been agreed that the revised Notes should provide for the possibility of witness testimony by remote means. It might be therefore be preferable to delete the text in parentheses altogether.

34. **Ms. Bingham** (Observer for the International Council for Commercial Arbitration) proposed that, for the sake of clarity, the words "submissions in relation to hearings" in the subheading of section (a) and the words "additional submissions" in paragraph 120 be replaced with the words "post-hearing submissions".

35. *It was so decided.*

(b) Scheduling of hearings (paragraphs 122-126)

36. **Mr. Greenberg** (Australia), drawing attention to paragraph 126, asked whether it was correct to interpret the words "before and shortly after the close of the hearings" as meaning that the tribunal's deliberations might take place before the hearings.

37. **The Chair** said that that wording had been chosen to reflect the various approaches in that regard, some arbitrators considering that deliberations should begin before the close of the hearings while others were in favour of deliberations from the outset of the arbitration. It was particularly important that the tribunal consult immediately after the hearings in order to be able to draw at least some conclusions as to how to proceed. It might therefore be desirable to highlight those approaches by amending the paragraph to the effect that the tribunal should set aside time for deliberations not only before or shortly after the close of the hearings but throughout the proceedings.

38. *It was so agreed.*

(c) The order in which the parties will present their arguments and evidence (paragraph 127)

39. **Mr. Castello** (United States of America) said that the guidance in paragraph 127 on determining which party had the last word should be more detailed. Rather than indicating simply that the tribunal had broad latitude in that respect, it might be more useful to add that the non-moving party usually had the last word.

40. **The Chair**, supported by **Mr. Greenberg** (Australia), said that while it could be indicated that that practice was frequent, such an amendment would necessitate acknowledgement of the opposite practice in common-law jurisdictions of giving the claimant the last word. He suggested that those divergent practices be reflected.

41. *It was so agreed.*

(d) Arrangements for a record of the hearings (paragraphs 128 and 129)

42. **The Chair** proposed that paragraph 128 be amended to caution that the transcription of an audio recording by a person not present at the hearing concerned could prove difficult, particularly if more than one language was spoken in the hearing room or if some persons spoke with an accent that made them difficult to understand, and could consequently be costly.

43. *It was so agreed.*

Note 18. Multiparty arbitration (paragraphs 130 and 131)

Note 19. Joinder and Consolidation

(a) Joinder (paragraphs 132-134)

(b) Consolidation (paragraphs 135 and 136)

44. **The Chair** said that the final sentence of paragraph 130 should be clarified as referring to parties on the same side in the arbitration.

45. **Mr. Greenberg** (Australia), endorsing that comment, wondered whether note 18 should address arbitrations that arose from more than one arbitration agreement forming the basis for the parties' consent, given that that issue raised particular concerns and was dealt with by a number of sets of arbitration rules.

46. Drawing attention to the final sentence of paragraph 133, he said that the only situation in which a party to be joined would not need to be bound by the arbitration agreement forming the basis for the arbitration would be where a new claim was brought by an existing party against the party to be joined on the basis of a different arbitration agreement that also bound all of the parties to the first arbitration. The sentence thus appeared to address a situation that could only arise in the case of multiple arbitration agreements, but it appeared to be the only provision in which that point was addressed. If it was decided that the Notes should not address multiple arbitration agreements, that sentence would need to be revised.

47. **The Chair** recalled that although there had been some hesitation in the Working Group about addressing such a broad and complex issue in the context of organizing arbitral proceedings, the Group had eventually decided that it was necessary to do so. As a result, a broad range of issues required consideration.

48. **Mr. Greenberg** (Australia) said that while detailed guidance on the issue might be beyond the scope of the Notes, attention should be drawn to it. It might be sufficient to do so in one or two sentences, possibly under a new subheading, simply indicating that particular concerns with regard to consent arose in situations where arbitration was initiated or claims within an arbitration were brought on the basis of more than one arbitration agreement. Alternatively, wording could be introduced to the effect that some arbitration rules dealt specifically with such situations, thus drawing the attention of parties and arbitrators to the fact that multiple arbitration agreements could pose difficulties.

49. **Mr. Apter** (Israel) said that whereas guidance was provided on the circumstances in which consolidation might be allowed, no such guidance was given with regard to joinder. He therefore proposed that criteria governing the approval of requests for joinder be included in note 19 (a).

50. **The Chair** said that one such criterion was already set out in the first sentence of paragraph 133, which could be expanded to provide also for situations in which the tribunal's decision in an arbitration between two parties might be prejudicial to a third party unless that party was joined in the arbitration. In addition, a request for joinder might be granted in the interests of greater procedural efficiency.

51. **Mr. Greenberg** (Australia) said that it might be useful to refer, by means of a footnote, to article 17 (5) of the UNCITRAL Arbitration Rules as revised in 2010, which set out guidance on situations in which joinder might be allowed.

52. **Mr. Zunzunegui** (Spain) said that the word "joinder" should be rendered in Spanish as *terceros coadyuvantes* rather than *tercería coadyuvante* in the heading of note 19 and the subheading of section (a) of that note.

53. **Ms. Montineri** (International Trade Law Division), welcoming that comment, invited delegations whose language was one of the official languages of the United Nations to submit any further terminological or linguistic recommendations to the secretariat, which would take those recommendations into account as part of its work to ensure that all language versions were correct and consistent in advance of the adoption of the draft revised Notes.

54. **Ms. Bustamante** (Ecuador) said that it was important that the Notes address parallel proceedings, which might be dealt with most appropriately under note 19.

55. **The Chair** suggested that the Commission consider that issue, which might arise where consolidation or joinder were not possible or did not take place, during its discussion of future work. Aspects of that issue to be considered might include communication between tribunals where an arbitrator was member of both tribunals in parallel proceedings.

56. **Ms. Bensefa** (Algeria) said that, in view of the potential costs and difficulties arising from parallel proceedings, the issue certainly warranted further consideration. However, in view of its complexity, particularly in the case of treaty-based arbitration, the Commission should discuss further whether the topic should be dealt with in the draft revised Notes.

The meeting was suspended at 3.25 p.m. and resumed at 4.05 p.m.

Note 20. Possible requirements concerning the award (paragraphs 137-139)

57. **Mr. Apter** (Israel), referring to paragraph 137, said that the parties and the tribunal, when considering possible requirements with respect to the award, should also bear in mind potential issues arising from restrictions on trade or payment, as referred to in paragraph 44 of the draft revised Notes in relation to deposit of costs. Such issues could arise if, for example, an award was issued but the payment of that award was in violation of a sanction.

58. **The Chair** said that such issues would be governed by the applicable law and possibly other factors determining the content of the award. That raised the question of the extent to which the Notes should deal with the content of awards, since specific treatment of such matters as payment might lead to criticism of the Notes as failing to address other issues.

59. **Mr. Apter** (Israel) said that, in that case, the heading of note 20 might need to be amended to make clear that paragraphs 137 to 139 did not provide guidance with regard to the form or content of awards, since the requirements referred to did not concern the award itself.

60. **Mr. D'Allaire** (Canada) said that note 20 was unnecessary, as the question of requirements concerning the award was beyond the scope of the Notes. If note 20 was to be retained, however, it should be expanded, as many practical aspects of the rendering of an award were not addressed, such as the questions of whether the award was made on the basis of a vote; whether it should be signed by all tribunal members; in the case of an international tribunal, whether electronic signatures were acceptable; whether a hard-copy original of the award, signed by all of the tribunal members, was necessary; how the issues covered by the award and the decisions made should be recorded; and, in multilingual proceedings, whether the award should be published in more than one language and which versions would be considered official. Reference could also be made to the need to provide the legal basis for the award, since there could be grounds for setting aside an award that was not based on the applicable law, or it might be, for example, that the parties had agreed that the tribunal should decide on the award *ex aequo et bono*.

61. **The Chair** said that, while the examples given were useful, it might be difficult to decide which aspects should be included and indeed to limit such a list if the note was expanded as suggested.

62. **Mr. Jacquet** (France) said that neither the removal of note 20 nor its expansion was desirable. If the provisions were removed, the issues they addressed might be overlooked; on the other hand, it would be going too far to list aspects concerning form and content as suggested. The note should simply be retained as drafted, since, similarly to note 19 of the original Notes, it was appropriately limited to procedural aspects, namely the filing and delivery of the award, and was thus consistent with the purpose of the Notes.

63. **The Chair**, expressing support for those comments, said he agreed that unless there were aspects falling within the scope of the provision that had not been addressed, the revised text as drafted was sufficient.

*Note 8. Interim measures (*continued*)*

(a) Granting of interim measures (paragraphs 58-60)

64. **The Chair** recalled that the Commission, during its discussion of interim measures, had decided that the question of whether the Notes should provide guidance on the form and content of orders for interim measures would best be addressed in the light of its eventual decision with respect to the treatment of awards under note 20. In view of the conclusion reached with regard to that note, he took it that the Commission wished to remove the reference, in the final sentence of paragraph 59, to the form of interim measures, that sentence thus reading "An interim measure is usually temporary in nature".

65. *It was so decided.*

(b) Enforcement of settlement agreements resulting from international commercial conciliation/mediation (A/CN.9/832 and A/CN.9/846 and Add.1-5)

66. **Mr. Greenberg** (Australia), referring to paragraph 59 of document A/CN.9/832, expressed support for the recommendation of Working Group II that the Commission give that Working Group a broad mandate to consider how to address the topic of enforcement of settlement agreements resulting from mediation.

The meeting rose at 4.35 p.m.

Summary record of the 1004th meeting
Held at the Vienna International Centre, Vienna, on Thursday, 2 July 2015, at 9.30 a.m.

[A/CN.9/SR.1004]

Chair: Mr. Reyes Villamizar (Colombia)
Later: Mr. Schneider (Vice-Chair) (Switzerland)

The meeting was called to order at 9.50 a.m.

Consideration of issues in the area of arbitration and conciliation (*continued*)

(b) Enforcement of settlement agreements resulting from international commercial conciliation/mediation (A/CN.9/832 and A/CN.9/846 and Add.1-5) (*continued*)

1. **The Chair** said that the issue of enforcement of settlement agreements resulting from international commercial conciliation and the possibility of developing an international instrument to facilitate the harmonization of relevant regulations and practice had generated a great deal of interest. The Commission was therefore invited to consider whether there was a need for further work in that area and, if so, the most appropriate form that a possible instrument should take, such as a model law, a legislative guide or a convention.

2. **Mr. Sorieul** (Secretary of the Commission) recalled that the question of whether it was possible to establish a mechanism for the enforcement of settlement agreements resulting from conciliation had been discussed at length during the drafting of article 14 ("Enforceability of settlement agreement") of the UNCITRAL Model Law on International Commercial Conciliation (2002). As at the time of those deliberations, there continued to be great diversity among States with respect to conciliation processes and the ways in which the various legal systems allowed settlement agreements to be concluded and enforced. Furthermore, while the purpose of the envisaged mechanism would be to promote conciliation and the enforceability of resulting agreements, the question of whether such a mechanism was compatible with the very idea of conciliation had been raised. If it was decided that Working Group II should be entrusted with further work on the subject, that question would be among the areas of focus of the discussions. In addition to the preliminary work already undertaken by the Working Group, the secretariat had carried out research on how the issue was addressed in various countries (A/CN.9/846 and addenda). Since the work was now at a more mature stage, the Commission needed to decide whether it wished to mandate the Working Group to begin drafting a specific instrument at its next session and, if so, whether it was in a position to issue precise instructions to the Working Group regarding the form of that instrument.

3. **Mr. Havlik** (Observer for the European Union) said that, in view of the diversity of States' approaches to the issue, as highlighted by the replies to the questionnaire prepared by the secretariat, it seemed unnecessary to harmonize national methods for enforcing settlement agreements within States and, moreover, unrealistic that agreement on the issue could be found. While article 14 of the UNCITRAL Model Conciliation Law (2002) provided that settlement agreements were enforceable, a principle that was clearly a common denominator between the various legal systems, it left the method of enforcement to domestic law. Furthermore, harmonization would be difficult in so far as the proposed work would focus chiefly on cross-border enforcement of commercial settlement agreements once they had been made enforceable in the State in which the settlement had been reached. Given that work on the cross-border enforcement of court-approved settlements was already being carried out by the Hague Conference on Private International Law in the context of its "judgements project", and that formal negotiations on a resulting draft convention were to begin in 2016, parallel discussions on the same subject would be neither appropriate nor an efficient use of resources. His delegation was therefore sceptical about the need for future work on the topic.

4. **Ms. Montineri** (International Trade Law Division) drew attention to paragraph 48 of document A/CN.9/832, which outlined the main approaches to the enforcement of settlement agreements as identified on the basis of the numerous replies received from member States to the questions set out in document A/CN.9/846. Those replies highlighted that there was great interest in the issue.

5. **Ms. Bustamante** (Ecuador) said it was important that conciliation be developed as an efficient and cost-saving method of dispute resolution, particularly in countries such as Ecuador, where it was difficult to promote such alternative methods. It was therefore important to move the issue forward, and UNCITRAL was indeed the most appropriate body in which to discuss it. While there was no one solution that was the most appropriate, it was precisely because of the complexity of the issue and the concerns raised that the matter should continue to be discussed and analysed by the Working Group and the Commission.

6. **Mr. Apter** (Israel), expressing support for those comments, said that there was indeed a clear need to develop an instrument as proposed. The replies to the secretariat's questionnaire highlighted both the high level of interest in the subject and the fact that in most countries, while there was nothing in domestic law to prevent the enforcement of settlement agreements reached through conciliation, there were no specific legislative provisions addressing their enforcement, which might explain the limited use, in some cases, of conciliation as a dispute resolution method. While the related work undertaken by the Hague Conference on Private International Law was

important, it was focused on court decisions, whereas the proposed UNCITRAL project was of much broader scope, encompassing settlement agreements that were not validated through a court decision. His delegation therefore urged the Commission to mandate the Working Group to work on the topic at its next session, as a natural next step for the Working Group, with a view to deciding on the form of a possible instrument in the next year. Such a decision was not necessary at the present stage, but in view of the interest in the subject it was important that member States participate in that further work.

7. **Mr. Schnabel** (United States of America) said he agreed strongly that the Commission should mandate the Working Group to begin exploring the issue substantively, for the reasons already given by other speakers. He pointed out that at the Working Group's sixty-second session, no delegation had objected to further work on the topic. The Commission had already emphasized in the past the benefits of conciliation in terms of cost-saving and preservation of business relationships, and an instrument facilitating the enforcement of settlement agreements would promote the use of conciliation in cross-border disputes, encouraging businesses to invest time and resources in that method. It was to be hoped that such an instrument would give the use of conciliation the same kind of boost that arbitration had received from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) over the decades. While a convention would be the most useful type of instrument, a broad mandate was needed in order for the Working Group to decide on the most appropriate form of the instrument to be drafted.

8. Responding to the doubts expressed by the observer for the European Union as to the need for or feasibility of harmonization of national methods of enforcement, he said that should a convention be decided on, one of the advantages would be that if the model of the New York Convention was followed, it would not be necessary to attempt to resolve detailed procedural issues of national law or mandate one particular method, since the objective would simply be to ensure that settlements reached through conciliation were enforced, provided that no exceptions applied. With regard to the possible relevance of the work undertaken by the Hague Conference on Private International Law, while there were some similarities between the two projects, it was not inappropriate for two organizations to work on related though not identical aspects of the same issue. For example, UNCITRAL and the International Institute for the Unification of Private Law (UNIDROIT) had both worked on contract law in the past several years, and the Commission's Working Group V was currently engaged in work on the cross-border enforcement of insolvency-related judgements while the Hague Conference on Private International Law was concurrently working on a related project. The respective enforcement-related projects of UNCITRAL and the Hague Conference were not incompatible, and consistent results could be reached. The Commission's work on the issue would, it was hoped, be broader in scope, covering international commercial settlements generally.

9. **Mr. Popkov** (Belarus) said he agreed that the issue should remain on the Commission's agenda. Conciliation was increasingly attractive for Belarus and the wider region as a method of dispute resolution, particularly for business enterprises, given that it reduced costs and fostered stability in commercial relations. Since it was undesirable to come to a premature conclusion as to the nature of the work to be undertaken, the Commission could begin by focusing on promoting the development of domestic legislative frameworks for enforcement and for the clear legal regulation of mediation, including requirements for mediators, as a sound basis for the development of an effective international mechanism for enforcement.

10. **Ms. Jamschon Mac Garry** (Argentina) expressed support for the comments made by the representatives of Ecuador, Israel and the United States, adding that the Working Group was in a good position to advance its work on the subject.

11. **Mr. Bellenger** (France) said that he fully shared the strong reservations expressed by a large number of States in their written comments with regard to the possibility of a legislative solution to the enforcement of settlement agreements. Such agreements could not be enforced without the involvement of the courts. He also shared the doubts expressed with regard to the need for harmonization and the feasibility of the proposed work given the many different enforcement procedures under national legal systems. Even in the relatively homogenous context of the European Union, the European Enforcement Order was extremely difficult to enforce, so it would be all the more difficult to achieve harmonization through a global instrument.

12. **Mr. Kurashov** (Russian Federation) said that it would be useful to address the issue further, first identifying common approaches and differences in regulatory provisions and practices at the national level. In order to decide on the form of a possible instrument, it was necessary to first come to a clear understanding of whether there was truly a need for harmonization of those provisions and practices.

13. **Mr. Lee** (Republic of Korea) said that if a broad mandate was to be given to the Working Group as proposed, many issues and complexities could be addressed. The fact that the written comments submitted by States appeared to indicate a market need for harmonization of enforcement procedures made it all the more appropriate for the Commission and the Working Group to give the matter further attention.

14. **Ms. Szymańska** (Poland) said that her delegation associated itself with the sceptical position taken by a number of other delegations, for the reasons already given. While divergent conclusions could be drawn from the replies to the questionnaire circulated by the secretariat, it seemed clear that it would be very difficult to reach

agreement on the manner in which enforcement procedures should be harmonized. The proposal to draft a convention was therefore unrealistic, and it was doubtful that any such text would be useful or widely applied.

15. **Ms. Laborte-Cuevas** (Philippines) endorsed the comments made by the representatives of Israel and the United States.

16. **Mr. Chan** (Singapore) said that, in view of the need for and interest in further work on the topic, as evidenced by the written comments submitted by States, he joined earlier speakers in supporting the proposal for a broad mandate in that respect. However, in the light of the justified concerns expressed, many issues would need to be addressed carefully before the form of the instrument to be drafted was decided on.

17. **Mr. Schöfisch** (Germany) said that his delegation shared the doubts expressed with regard to the need for and feasibility of the proposed project given that it would be difficult to reach agreement on the many complex issues concerned, and therefore did not support a broad mandate for work in that area.

18. **Mr. Hamamoto** (Japan) said that his delegation had not adopted a particular position on the matter but considered that, while the enforcement of settlement agreements was important, priority should be given to the issue of concurrent proceedings in view of the problems they posed and the ways in which they could interfere with arbitration.

19. **Mr. Cachapuz de Medeiros** (Brazil) said that it was appropriate for UNCITRAL, as a multilateral forum, to carry out work on the enforcement of settlement agreements resulting from conciliation. While it was important to avoid duplication by working closely with other relevant organizations within and outside the United Nations system, all of the initiatives undertaken in the area of enforcement were important and useful. His delegation was therefore in favour of the Commission's further consideration of the topic.

20. **Mr. Ngugi** (Kenya), endorsing the comments made by the representative of Ecuador, said that his delegation was also in favour of the proposed Working Group mandate, particularly since the further development of conciliation was important in Kenya. He concurred with earlier speakers that the divergent views expressed by States emphasized the need for closer examination of the conceptual, legal and practical issues concerned.

21. **Mr. D'Allaire** (Canada) said that conciliation was a valid and useful method of resolving both domestic and international disputes, and was as important as arbitration. In Canada, which had adopted the UNCITRAL Model Conciliation Law (2002) and domestic regulations based on that Model Law, there had been wide-ranging discussions with various companies involved in international trade and a large number of other actors on the enforcement of settlement agreements. During those consultations, no objections had been raised to the possibility of a project to develop an international instrument in that area. The topic should therefore be referred to the Working Group for further work as a priority. The question before the Commission was not whether there was a need to harmonize enforcement procedures and practices, since that need had already been identified, but rather the manner in which such harmonization could be achieved. One possible solution would be to develop a mechanism modelled on article III of the New York Convention, establishing the obligation to recognize and enforce settlement agreements resulting from mediation but in a more flexible manner whereby the specific mechanism for enforcement could be left to the discretion of each State.

22. **Mr. Wen** (China) said that while it would be meaningful to mandate Working Group II to carry out further work on the enforcement of settlement agreements, particularly in view of the importance of supporting the use of conciliation, his delegation shared the concerns raised with regard to the feasibility of harmonization and the many complex issues involved, although many common points could be identified among the comments submitted by States. Rather than setting such an ambitious objective as the adoption of a convention, it would be more meaningful to begin by preparing a guidance text or model law, identifying key issues such as the extent of arbitral tribunals' involvement in settlement procedures.

23. **Ms. Pava Gutiérrez de Piñeres** (Colombia), expressing support for the comments made by the representatives of Argentina, the Russian Federation and Singapore, said she agreed that the Commission should continue to consider the issue on the basis of a broad mandate and that it should be decided at a later stage what the precise outcome of that further work should be.

24. **Mr. Möller** (Observer for Finland) said that his delegation shared the sceptical position stated by a number of other delegations since, among other reasons, it was unnecessary to go beyond the principle, established by article 14 of the UNCITRAL Model Conciliation Law, that settlement agreements were enforceable. If the Commission nonetheless decided to mandate the Working Group to work on the topic further in view of the support expressed for such further work, that mandate should be broad as proposed, since the objective of drafting a convention would be unrealistic.

25. **Mr. Schwarzenbacher** (Austria) said that his delegation also shared the scepticism expressed. A further question that should be considered was whether the enforcement of settlement agreements was contrary to article 6 of the European Convention on Human Rights, on the right to a fair trial, given that such enforcement might involve no formal proceedings at all. Referring to the comment by the representative of the Republic of Korea that there was a market need for the enforcement of settlement agreements, he said that that need might be greater in countries where there was a large gap between arbitration and mediation, an issue that was to some extent addressed by paragraph 70 of the draft revised Notes on

Organizing Arbitral Proceedings (A/CN.9/844), which stated that "In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties […] the arbitral tribunal […] may, if so requested by the parties, guide or assist the parties in their negotiations." In countries in central Europe, for example, mediation could be a part of arbitration.

26. **Mr. Malhotra** (India) said that, in the light of the good work carried out by the Working Group at its sixty-second session, the good response to the questionnaire circulated by the secretariat and the importance of encouraging the use of conciliation as a cost-effective and efficient method of dispute resolution, his delegation was in favour of the proposed further work and the development by the Working Group of possible solutions for consideration by the Commission at a later stage. The wide range of views on the subject was in itself sufficient to warrant further deliberation.

27. **Ms. Bensefa** (Algeria) said that her delegation was also in favour of such a mandate in view of the clear need for further consideration of the many and varied aspects of the issue, particularly in order to address the doubts and concerns raised.

28. **Ms. Cordero-Moss** (Observer for Norway) said that while the topic deserved discussion — although she understood the arguments against the proposed further work — and should be explored in the broad manner proposed in order to avoid an outcome that created more problems than it solved, she wondered whether it would be advisable to use the Commission's limited resources to accommodate such a broad mandate or whether those resources should instead be used to address another topic.

29. **Mr. Bobei** (Observer for Romania) said that, in view of the scepticism expressed by a number of States, the most appropriate approach might be to gather further information from jurisdictions worldwide, possibly by developing the questionnaire produced by the secretariat, in order to examine the extent and evolution of the use of conciliation in private practice and how that use could be developed in the future. On that basis, it could be decided whether UNCITRAL should draft an appropriate instrument.

30. **Mr. Soweha** (Observer for Egypt) emphasizing the importance of promoting conciliation, said that the proposed broad mandate was appropriate given the need for further in-depth consideration before a decision was taken on the form of a possible instrument.

31. **The Chair**, noting that there appeared to be consensus that the topic should be included on the agenda of Working Group II at its sixty-third session but agreement had not yet been reached as to what the specific outcome of the further work should be, took it that the Commission wished to give the Working Group a broad mandate to research the topic further and develop possible solutions. The Commission's decision would be reaffirmed during consideration of its work programme under agenda item 18.

32. *It was so decided*.

(c) Possible future work in the area of arbitration and conciliation (A/CN.9/848 and 855)

Concurrent proceedings

33. **Mr. Sorieul** (Secretary of the Commission) said that while document A/CN.9/848 did not provide a complete or comprehensive analysis of the subject of concurrent proceedings, it drew attention to possible solutions and options for further work in that area, including the possibility of drafting model treaty provisions. In deciding whether the topic should be taken up by Working Group II at its sixty-third session, the Commission should consider the extent to which the issue should be addressed in the context of commercial arbitration as well as that of investment arbitration, and whether the Working Group should examine only one topic or more at that session and beyond, bearing in mind the tentative decision that further work should be carried out on the enforcement of settlement agreements resulting from conciliation. If it was felt that the Working Group would be overburdened if asked to work on concurrent proceedings as well as other issues, the Commission might wish to consider the less formal approach, as adopted in the past with respect to other topics, of requesting the secretariat to conduct further research and keep abreast of developments with a view to referring the matter to the Working Group in the future. A formal decision on the topics to be addressed by the Working Group would be taken under agenda item 18 on the Commission's work programme.

34. **Mr. D'Allaire** (Canada) said that while document A/CN.9/848 showed that good progress had been made in the examination of the issue to date, and identified a number of key issues such as fairness in investment arbitration proceedings, further discussion and preparatory work were necessary in order to enable the Commission to undertake a specific project on the topic in the future.

35. **Ms. Jamschon Mac Garry** (Argentina) said that the issue was of critical importance and should be addressed as a priority. Among other aspects, the Commission should consider the potential negative impact of indirect claims by shareholders on the rights of local businesses.

36. She recalled that during the Commission's discussion of the draft revised Notes on Organizing Arbitral Proceedings, it had been suggested that concurrent proceedings be addressed in the Notes in the context of joinder and consolidation, a suggestion that her delegation supported. In that regard, it would be useful to address measures that could be taken to avoid or mitigate negative consequences of concurrent proceedings.

37. **Mr. Popkov** (Belarus) said that the topic of concurrent proceedings in investment arbitration was of great practical importance not only in view of the specific difficulties that could arise from such proceedings but also with respect to the drawing up of international treaties on investment protection, investment contracts and national legislation. Addressing the difficulties that concurrent

proceedings posed would improve trust in investment arbitration. His delegation therefore supported further consideration of the topic, if possible as a priority.

38. **Mr. Havlik** (Observer for the European Union) said he agreed that it was important to address concurrent proceedings in treaty-based investor-State arbitration, an issue that was challenging both for treaty negotiators and for arbitrators, particularly where the treaty on which an arbitration was based established no provisions concerning such proceedings. He therefore supported the proposal that the secretariat carry out further technical work on the topic, in consultation with a group of experts, with a view to the submission of specific proposals at a later stage. However, since the topic was politically very sensitive, particularly when it came to the relationship between investment arbitration and national domestic courts, he sought reassurance that the envisaged work would remain of a technical nature, leading to the presentation of a range of possible solutions so that policy choices as to how to address the issue in investment treaty practice remained with States. Subject to that clarification, his delegation would readily support further technical work on the topic.

39. **Ms. Bustamante** (Ecuador) said she shared the view that the issue of concurrent proceedings should be a priority for the Working Group and agreed that a technical group should be established to address the various complexities of the issue and develop possible solutions with a view to providing arbitrators with adequate guidance. While resources were limited, prioritization of the topic need not preclude the possibility of further consideration by the Working Group of the enforcement of settlement agreements resulting from conciliation, a topic that should not be left aside.

40. **Ms. Bensefa** (Algeria), expressing support for the comments made by the representatives of Argentina and Ecuador, said that Algeria had also faced serious problems arising from concurrent proceedings and had experienced situations in which investment treaties that it had concluded had worked against it. Furthermore, concurrent proceedings posed ethical issues and in the future might present other, as yet unforeseeable, problems. It was therefore important that investment treaties be appropriately strengthened. Referring to the comment made by the representative of the European Union regarding the sensitivity of the topic, she emphasized that the issues concerned were purely technical and the objectives of concurrent proceedings purely financial.

41. **Mr. Schöfisch** (Germany) said that his delegation was in favour of requesting the secretariat to continue to work on the topic with the help of a group of experts and, rather than developing specific recommendations, to analyse the issues concerned and develop solutions, thus providing States with flexibility in tackling the problem.

42. **Mr. Schnabel** (United States of America) said that his delegation would prefer the Working Group to prioritize work on the enforcement of settlement agreements resulting from mediation. With regard to concurrent proceedings, further discussion and work would be needed before any substantive work could be contemplated. Concerning the question as to the possible breadth of future work on the topic, the commercial arbitration context should be taken into account given that a number of issues were potentially relevant in that context, such as communication between tribunals, as had been touched on during the discussion of notes 18 and 19 of the revised draft Notes on Organizing Arbitral Proceedings (on multiparty arbitration and joinder and consolidation). He shared the view that work on concurrent proceedings should remain of a technical nature, and endorsed the suggestion that the issues raised be explored initially by a group of experts together with the secretariat, which would enable the Commission to determine at a later stage whether the Working Group should work towards a specific outcome.

43. **Mr. Wen** (China) suggested that instruments such as the North American Free Trade Agreement (NAFTA) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States be used to guide further work on the subject.

44. **Mr. Apter** (Israel) said that priority should be given to the topic of enforcement of settlement agreements resulting from conciliation as the Working Group's next project, without precluding the possibility of future work on concurrent proceedings. The basis for further work by the Working Group on the latter subject was not sufficient. UNCITRAL had already carried out a great deal of work on treaty-based investment arbitration and the time had come to return to focus on commercial arbitration and to undertake new work rather than updating existing instruments. However, his delegation had no objection to the secretariat's continuing to explore the issue of concurrent proceedings, possibly with a view to proposing model clauses for investment treaties, as recommended in document A/CN.9/848.

45. **Mr. Lee** (Republic of Korea) said that concurrent proceedings were one of the most important issues arising from the negotiation and implementation of investment treaties, and the points raised in document A/CN.9/848 were therefore very important and timely. However, given the many complex and unresolved issues involved, it would be helpful if the secretariat provided further justification for the possible prioritization of the issue, thus facilitating more focused and productive discussions.

46. **Mr. Bellenger** (France), expressing support for the comments made by the representatives of Germany, Israel and the European Union, said that the issue was sensitive and should be handled with caution. The Commission should therefore adopt a technical and analytical approach, tasking the secretariat with continuing its research for the time being, and avoid considering standard provisions of any kind.

47. **The Chair** said that there appeared to be consensus that the issue of concurrent proceedings should remain on the future agenda of the Commission. However, a final

decision both on that topic and that of the enforcement of settlement agreements resulting from mediation would be taken under agenda item 18 during the following week of the session.

The meeting was suspended at 11.30 a.m. and resumed at 11.55 a.m.

48. **Mr. Sorieul** (Secretary of the Commission) said he understood the conclusion of the Commission's discussion on concurrent proceedings to be that it was as yet premature to refer that topic to the Working Group, and that the secretariat would be asked to continue its research with the assistance of a group of experts with a view to a decision at a later stage as to whether a specific instrument should be drafted. Such a project would of course involve the participation of the member States. Responding to the comments that the Commission's deliberations on the topic should remain technical, he underscored that the secretariat was committed to focusing on technical issues and avoiding unnecessary policy discussions, in accordance with the Commission's traditional working method. If the research on those technical issues showed that discussions should proceed at the intergovernmental level, the Commission would be informed of the work carried out and the conclusions reached, including as to whether it was possible or desirable for discussion to continue at that level.

49. **Ms. Bustamante** (Ecuador) said it was important to make sure that the views and experience of countries affected by concurrent proceedings would be taken into account. Their positions were based not on policy but on practice. It was also important to give the Working Group a mandate parallel to the technical work to be undertaken by the secretariat.

50. **Mr. Sorieul** (Secretary of the Commission), replying to a question from **Ms. Jamschon Mac Garry** (Argentina), said that purpose of the work to be conducted by the group of experts would be to give impetus to intergovernmental deliberations on the topic. The work on concurrent proceedings would not be ready in time for the next session of the Working Group, which would not have a mandate to work on the issue until 2016 at the earliest. In 2016, the group of experts would submit its findings and the Commission would then have to decide whether intergovernmental work should be undertaken.

51. Responding to the comment made by the representative of Ecuador, he said that all stakeholders that had faced difficulties in relation to claims pursued through concurrent proceedings, including member States, would be involved in the consultations.

Code of ethics for arbitrators

52. **Ms. Bensefa** (Algeria), introducing the proposal contained in document A/CN.9/855, said that the issue of ethics among arbitrators was sensitive and challenging, since it related more to an arbitrator's personal moral code than to the rules and regulations governing arbitral proceedings. A set of deontological rules was just as necessary as the various instruments established to govern the proceedings themselves. The aim of the proposed code would be to strengthen the role of the arbitrator as a neutral and impartial actor who reached his or her decisions on the basis of the international treaties ratified by the States concerned. Moral values were at the core of the arbitration process, and the establishment of a code of ethics would show that the arbitrator's role was an important and central one around which other roles revolved. Accordingly, such a code would be used by arbitrators in their work without any constraints, and indeed need not be confined to arbitrators.

53. **Mr. Leong** (Singapore), noting that the proposal appeared to be limited to the context of investor-State arbitration, sought clarification as to whether the proposed code was envisaged as potentially applying also to other types of arbitration.

54. **Ms. Bensaoula** (Algeria) said that although it was envisaged that the project would initially focus on investor-State arbitration, there was nothing to prevent expansion of the code to cover other areas of arbitration.

55. **Mr. D'Allaire** (Canada) said that while he supported the proposal, the issue should be considered broadly rather than within the restricted context of investment arbitration. Moreover, before a decision was taken on future work to be carried out on the topic, it would be necessary to first establish what work, if any, had already been carried out by other organizations and to determine the extent to which existing instruments developed by those organizations provided adequate solutions, which would make it possible to determine more precisely what was at stake, the challenges or difficulties faced and possible solutions. To that end, it would be helpful to request the secretariat, possibly in consultation with experts, to explore the topic in greater depth and prepare a document setting out the results of that research.

56. **Mr. Apter** (Israel) said he agreed that the issue should be considered in the context of arbitration in general and that the secretariat should explore the issue broadly in order to determine whether there was a need for a global instrument in the area.

57. **Ms. Jamschon Mac Garry** (Argentina), expressing support for future work on the topic, wondered whether different codes would be required for different types of arbitration. She concurred that the proposed code should not focus exclusively on investor-State arbitration.

58. **Mr. Jacquet** (France) said that while his delegation was in favour of the proposal, it shared the view that the work should not be limited to investor-State arbitration. No distinction should be made between arbitrators working in different areas of arbitration in terms of the ethical standards that they should uphold. There were also limitations to the scope of such a code in that focusing on the ethical conduct of arbitrators could not be a remedy for disappointments that parties might have suffered or might suffer as a result of arbitration. It would be necessary to examine the "hidden" rules tacitly followed by arbitrators. Since many rules of ethical conduct were already covered

by legal regulations, it would be necessary to identify the areas not covered by such regulations and to ensure that any ethical rules established would be applicable both to arbitration proceedings and to arbitral awards. While it would be impossible to impose sanctions for non-compliance with such rules, an instrument of soft law would be better than nothing.

59. **Mr. Schnabel** (United States of America) said he agreed that all forms of arbitration should be included in the scope of the proposed code, and that the work carried out by other organizations, as well as relevant instruments and legal regulations, should be examined as a first step in order to determine what, if anything, could be done to add to that existing work. Moreover, different sets of ethical rules might apply, depending, for example, on the arbitrator's home jurisdiction or the forum State. Ethical issues concerned all lawyers participating in international arbitration, not only those participating as arbitrators.

60. **Mr. Mirza** (Pakistan) said that his delegation fully supported the proposal made by the Government of Algeria. It was important that the envisaged code should address and provide solutions to potential conflicts of interest arising from disclosure issues, and that existing rules and regulations be taken into account.

61. **Mr. Popkov** (Belarus) said he agreed with the representative of France that duplication of existing legal rules or standards should be avoided, particularly since the development of the proposed code of conduct would be a new area of work for UNCITRAL. To that end, it was important to conduct research to determine how ethical issues were regulated at the national level. Other international organizations might have established instruments whose scope encompassed ethical considerations, not only in relation to arbitration proceedings. While ethical standards in investment arbitration and commercial arbitration could be consolidated, it was necessary to examine the differences between the two areas, as was indeed the case each time UNCITRAL developed a new instrument, given that investment arbitration posed specific issues. The Commission should therefore adopt a cautious and balanced approach to the subject.

62. **The Chair** suggested that, in the light of the comments made, the Commission task the secretariat with exploring the matter broadly, inter alia by consulting with States and conducting research on any relevant work carried out by other organizations, including governmental and non-governmental organizations, not only in the area of investment arbitration but also in all other areas of arbitration. The secretariat could then report to the Commission at its following session on that research in order to enable the Commission to determine whether further work was necessary.

63. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat would proceed with consideration of the issue on the basis of the views expressed, beginning with research on existing rules established by other international organizations and any relevant legislation adopted by member States. Any text to be developed would be an instrument of soft law rather than a binding instrument. Although the topic of ethics in both investment and commercial arbitration had previously arisen within both the Working Group and the Commission, it had been discussed only as a possible area of future work, since it had not been regarded as a matter of urgency. However, it was now more pressing owing to the questions raised with respect to legitimacy in investor-State arbitration, which had led to growing criticism of the international arbitration system with regard both to investment arbitration and to commercial arbitration. It was important for specialized intergovernmental bodies such as UNCITRAL to begin work on the topic in order to restore the credibility of that system. It would therefore be necessary for the secretariat to examine the lessons learned from the preparation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and then report to the Commission on additional work that could be undertaken.

64. **The Chair** said that the proposal would be discussed further during informal consultations following the meeting.

(a) Consideration and provisional approval of revised UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/826, 832 and 844) (*continued*)

Mr. Schneider (Switzerland), Vice-Chair, took the Chair.

65. **The Chair** said that the outcome of the Commission's discussions during the first part of the session was that the Commission wished to provisionally approve the draft revised Notes on Organizing Arbitral Proceedings and request the secretariat to finalize the text on the basis of those discussions and submit the final version to the Commission for adoption at its forty-ninth session. In the course of that process of finalization, the secretariat might have to seek further input from the Working Group. The Commission was therefore invited to approve that further work.

The meeting rose at 12.30 p.m.

Summary record of the 1005th meeting
Held at the Vienna International Centre, Vienna, on Thursday, 2 July 2015, at 2 p.m.

[A/CN.9/SR.1005]

Chair: Mr. Reyes Villamizar (Colombia)

The discussion covered in the summary record began at 3 p.m.

Consideration of issues in the area of arbitration and conciliation (*continued*)

(d) Establishment and functioning of the transparency repository

1. **Mr. Sorieul** (Secretary of the Commission) recalled that, in implementation of article 8 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, a repository of published information under the Rules, the "transparency repository", had to be established. Given that the key objective of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was to apply the Rules on Transparency, including its article 8, to existing investment treaties, the repository function provided for in the Rules was also relevant to the operation of the Convention. He also recalled that the Commission, at its forty-sixth session, had expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of transparency repository. At that session, it had been said that the United Nations, as a neutral and universal body, and its secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core functions of the transparency repository as a public administration directly responsible for the servicing and proper operation of its own legal standards. Consequently, the General Assembly, in operative paragraph 3 of its resolution 68/106 of 16 December 2013, had recognized that opinion and had invited the Secretary-General to consider performing the role of the transparency repository through the secretariat of the Commission and requested the Secretary-General to report to the General Assembly and to the Commission in that regard.

2. He further recalled that, at the Commission's forty-seventh session, the secretariat had reported on steps taken in respect of the repository function to be performed, including the preparation of a dedicated web page, which was now in operation. The web page presently contained five Canadian cases rendered under the North American Free Trade Agreement, that information having been provided by the Government of Canada on a voluntary basis. In 2014, the Commission had also been informed that the secretariat had sought from the General Assembly the funding necessary to enable the UNCITRAL secretariat to undertake the role of the repository. However, in line with the request by some States that the additional mandate bestowed on the UNCITRAL secretariat be fulfilled on a cost-neutral budgetary basis in relation to the United Nations regular budget, efforts had been made to establish the repository as a pilot project temporarily funded by voluntary contributions. The Commission had encouraged the secretariat to pursue its efforts to raise the necessary funding through extrabudgetary resources, although it had been noted that, naturally, the long-term operation of the registry would be greatly facilitated if regular budget resources became available. After discussion, the Commission had reiterated its mandate to the secretariat to establish and operate the transparency registry, initially as a pilot project, and to that end to seek any necessary funding.

3. Upon considering the report of the Commission, the General Assembly, in operative paragraph 3 of its resolution 69/115 of 10 December 2014, had noted with appreciation that the secretariat of the Commission had taken steps to establish and operate the transparency repository as a pilot project temporarily funded by voluntary contributions. In that regard, the General Assembly had requested the Secretary-General to keep the General Assembly informed of developments regarding the funding and budgetary situation of the repository. On that basis, the secretariat had continued its efforts to establish and operate the repository by preparing the necessary project documents, seeking extrabudgetary resources and making efforts to formalize existing commitments. In that regard, the commitment made by the European Commission was noted with particular gratitude.

4. However, the Office of Legal Affairs and the Office of Programme Planning, Budget and Accounts had indicated that operative paragraph 3 of General Assembly resolution 69/115 did not constitute a proper mandate for the secretariat because the General Assembly had not specifically requested the Secretary-General to establish and operate the transparency repository. The question had also been also raised as to whether such a resolution would require the consent of the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee of the General Assembly following consideration of possible programme budget implications, since rule 153 of the rules of procedure of the General Assembly required such consultation where expenditures were anticipated in respect of a resolution. While that rule had not been invoked, given that no regular budget expenditure had been anticipated for the pilot project, it had indeed been the practice of the General Assembly to adopt resolutions on the recommendation of the Sixth Committee without discussion of financing where no application was to be made for regular budget funding. Furthermore, such consultation had not been held for two practical reasons. The first was that the discussions held during the sixty-eighth session of the General Assembly in 2014 had focused on reducing the programme budget for the biennium 2016-2017. Accordingly, representatives in

the Fifth and Sixth Committees had indicated that it would be ill-advised to seek additional resources for the repository even though there was general support for the objective of its being operated by the secretariat of the Commission pursuant to a General Assembly resolution. The second was that it had not been possible to prepare an accurate estimate of the amount of resources that would be needed to operate the repository, and even at the present stage, the Rules on Transparency having been in force for almost a year, it remained to be seen how much information would be published through the repository mechanism and what would be required in terms of resources, which would naturally depend on the number of cases to be published as well as the system to be put in place. Should additional, regular budget resources be sought in the future, it was the duty of the secretariat to provide information that was as accurate as possible to the General Assembly.

5. The pilot project route had therefore been decided upon in 2014 essentially for three reasons: to gather information about the operation of the registry; to see how many cases would be received during the initial period; and to provide the secretariat with information that would be submitted to the General Assembly to facilitate its consideration of whether or not to give a long-term mandate to the secretariat of the Commission to operate the registry. In order to move the project forward, and to respond to questions about the mandate, the UNCITRAL secretariat had been prepared to seek a clear expression of that mandate from the General Assembly as soon as feasible. However, given that the Sixth Committee, which was responsible for UNCITRAL-related matters, would resume its operations only in October 2015, a General Assembly resolution being expected in December, an interim solution had to be sought in order for the secretariat to be in a position to implement even the pilot project. Another concern that had been raised was the apparent lack of extrabudgetary resources available to implement the mandate. Recalling that the European Union had generously offered a contribution of €100,000, he said that in April 2015 the UNCITRAL secretariat had received confirmation from the Organization of the Petroleum Exporting Countries (OPEC) Fund for International Development (OFID) that it had approved a grant of $125,000 for the project. Consequently, there would be sufficient funds to operate the pilot project on a temporary basis. He therefore suggested that the Commission express its appreciation to the European Union and to OFID for their contributions, which, it was hoped, would enable the secretariat to begin recruiting the necessary project staff. When informed of those recent developments a few weeks previously, the Assistant Secretary-General for Legal Affairs (the Legal Counsel) had informed the UNCITRAL secretariat that it could proceed with the initial phase of the project for no more than one year and on the understanding that an appropriate project mandate would obtained by the end of the year.

6. It had been made clear that the operation of the transparency repository would raise no liability issues, since article 3 of the Rules on Transparency provided that the repository would not be involved in any decision-making regarding the information to be published. Therefore, noting that the voluntary contributions made by OFID and the European Union would cover the costs of the repository for approximately one year, the secretariat had been asked to formalize the funding arrangements, including detailed terms and conditions, for those contributions in coordination with the General Legal Division of the Office of Legal Affairs. It was expected that the Commission would be able to reach a final agreement with OFID within a few weeks. However, with regard to the funding arrangement with the European Union, a number of provisions had been considered problematic by the General Legal Division in the context of the broader discussion between the United Nations and the European Union concerning the Financial and Administrative Framework Agreement between the European Community and the United Nations. Consequently, the secretariat had been advised that the European Union funding, which, it was hoped, would be accepted in 2015 upon the signature of the agreement, would be available for spending only after an appropriate mandate was secured from the General Assembly. That was to say, for all practical purposes, at the beginning of 2016. The secretariat had therefore been advised by the Legal Counsel to begin immediately to take steps to secure a stronger mandate from the General Assembly in the autumn of 2015. The mandate should include appropriate language for the establishment of the repository initially for a one-year pilot phase, which would be funded entirely by voluntary contributions, and subsequently for the longer-term establishment of the transparency repository, which might require discussion with the Fifth Committee. It was proposed that the Commission recommend to the General Assembly that it request – the word “request” being crucial – the secretariat of the Commission to establish and operate the repository in accordance with article 8 of the Rules on Transparency as a pilot project until the end of 2016, on the condition that such operation be funded entirely by voluntary contributions. It was also proposed that the Commission recommend to the General Assembly that it be kept informed of any subsequent developments through appropriate reporting by the Secretary-General. Since the issue had been under discussion for three years, it was necessary, as in the past, to consider the possibility that a fallback position might have to be found, and the secretariat needed to know at least what was expected of it at the end of the trial period. There were three possible ways forward: at the end of that period, to continue on an extrabudgetary basis, which would again require that the entire operation of the repository be covered by extrabudgetary resources; to seek regular budget resources, which naturally remained subject to the general trend towards further reduction of the regular budget; or to delegate the operation of the repository to an outside entity. He recalled that those options had already been discussed earlier in 2015, and in that regard he expressed gratitude to the Permanent Court of Arbitration

for having indicated its willingness to act as repository if that third solution were to be adopted.

7. The time and effort that establishment of the repository had required had not been anticipated. There had been extraordinary resistance to the establishment of the repository as an extrabudgetary enterprise, partly because the Office of Legal Affairs was anxious to avoid any possibility that the project might entail financial liability for the Organization. In that respect, every effort had been made to ensure that that would not be the case. He expressed the hope that the project could begin by the end of 2015. It was thanks to the personal commitment of the Legal Counsel, who had clearly expressed his willingness to support that step, that the secretariat was able to deliver a positive report on the status of the transparency registry.

8. **Mr. D'Allaire** (Canada) expressed appreciation for the secretariat's oral report and for its efforts to bring what was an extremely important project to fruition, particularly in the light of the many challenges faced. He trusted that those efforts would help to bring about the realization of the project in the very near future.

9. **Mr. Schnabel** (United States of America), expressing support for those comments, said that his delegation greatly appreciated the secretariat's many hours of work on the issue and looked forward to continued discussion among interested States, including with regard to the possible courses of action to be taken at the end of the pilot period. He expressed the hope that the formal operation of the repository would begin soon, and endorsed the suggestion that the General Assembly be requested to provide the explicit mandate required.

10. **The Chair** said he took it that the Commission wished, in line with the recommendation of the Legal Counsel, to request the General Assembly to authorize the secretariat to operate the transparency repository as a pilot project for the first year, on the condition that such operation would entail no financial liability for the Organization and that the repository would be funded entirely by voluntary contributions.

11. *It was so decided*.

The meeting was suspended at 3.25 p.m. and resumed at 4 p.m.

(e) International commercial arbitration moot competitions

12. **Mr. Lee** (International Trade Law Division) said that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the twenty-second Moot in Vienna from 27 March to 2 April 2015, which had been co-sponsored by the Commission. The legal issues addressed in the Moot had been based on the United Nations Convention on Contracts for the International Sale of Goods (United Nations Sales Convention) and a total of 298 teams from law schools in 72 jurisdictions had participated, the best team in oral arguments being from Canada. The twenty-third Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 18 to 24 March 2016.

13. The twelfth Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Vis East Moot Foundation and co-sponsored by the Commission and the East Asia branch of the Chartered Institute of Arbitrators, and the final oral arguments phase had been held in Hong Kong, China, from 15 to 22 March 2015. A total of 107 teams from 29 jurisdictions had taken part in the Moot and the winning team in the oral arguments had been from Singapore. The thirteenth East Moot would be held in Hong Kong, China, from 6 to 13 March 2016.

14. Carlos III University of Madrid had organized the seventh International Commercial Arbitration Competition in Madrid from 20 to 24 April 2015, which had also been co-sponsored by the Commission. The legal issues addressed had related to international master franchising contracts relating to the sale of goods, where the United Nations Sales Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNIDROIT texts on franchising and the Rules of Arbitration of the Court of Arbitration of Madrid had been applicable. A total of 30 teams from law schools or master's degree programmes in 13 countries had participated in the Moot, which had been held in Spanish. The best team in oral arguments had been Pontificia Universidad Católica del Peru. The eighth Madrid Moot would be held from 25 to 29 April 2016.

15. The first mediation and negotiation competition organized jointly by the International Bar Association and the Vienna International Arbitration Centre, co-sponsored by UNCITRAL, was taking place in Vienna from 1 to 4 July 2015. The legal issues dealt with had been based on those addressed during the twenty-second Willem C. Vis International Commercial Arbitration Moot. A total of 16 teams from law schools in 13 countries were participating in the competition.

16. **The Chair** expressed appreciation for the work that was being done to promote such competitions among students and to give them practical experience of the Commission's work.

The discussion covered in the summary record ended at 4.05 p.m.

Summary record (partial) of the 1006th meeting
Held at the Vienna International Centre, Vienna, on Friday, 3 July 2015, at 9.30 a.m.

[A/CN.9/SR.1006]

Chair: Mr. Reyes Villamizar (Colombia)
Later: Mr. Schneider (Vice-Chair) (Switzerland)

The meeting was called to order at 9.40 a.m.

Adoption of the report of the Commission
(A/CN.9/XLVIII/CRP.1/Add.1-3)

1. **The Chair** invited the Commission to consider documents A/CN.9/XLVIII/CRP.1/Add.1-3, which contained the sections of the draft report relating to the Commission's deliberations on the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings.

Mr. Schneider, Vice-Chair, took the Chair.

A/CN.9/XLVIII/CRP.1/Add.1

2. **Mr. Castello** (United States of America), referring to paragraph 4 of the document, recommended the insertion of the words "in the face of such disparate practices, to", so that the full phrase read "… the Notes should not seek to harmonize disparate arbitral practices, or in the face of such disparate practices, to recommend the use of any particular procedure". The reason for that change was that it was inaccurate to say that the Notes never recommended the use of any particular procedure. Indeed, the first substantive paragraph, paragraph 13, of the draft revised Notes (A/CN.9/844) indicated that it was usually desirable for parties to attend procedural meetings. As he understood it, the Notes were intended to recognize that different arbitrators did things differently, and to avoid prescribing one practice to the exclusion of all others.

3. *It was so decided*.

4. **The Chair** recommended the removal of the word "draft" before "revised Notes" in paragraphs 5 and 6 because they were the final versions.

5. **Mr. Castello** (United States of America), referring to the discussion in paragraph 8 regarding the use of the term "document" in the Notes, said that it would be beneficial to reflect that discussion in greater detail given that there were a number of paragraphs in the Notes in which the word "document" should be replaced with a more specific term to clarify the scope of those paragraphs. He therefore suggested the addition, at the end of the second sentence, of wording along the lines of ", sometimes instead to written submissions, and sometimes also to copies of legal authorities".

6. *It was so agreed*.

7. **The Chair**, referring to the words "for instance with respect to the constitution of the arbitral tribunal" in paragraph 18, recalled that there had been some debate concerning the particularly difficult situation in which the parties agreed after the arbitral tribunal had been constituted that an arbitration institution would administer the dispute. He therefore suggested replacing those words with "in particular if the arbitral tribunal was already constituted".

8. *It was so decided*.

9. **Mr. Castello** (United States of America) suggested replacing the word "would" with "may" in paragraph 23, as he did not recall the Commission categorically stating that the submission of case law would not be advisable where arbitrators were familiar with it. Whether or not the parties and their counsel were also familiar with the case law was also a consideration.

10. **The Chair**, also referring to paragraph 23, said that the word "necessary" might be a more accurate alternative to the word "advisable". If those two suggestions were accepted, the proposed wording would be "submission of case law may not be necessary".

11. *It was so decided*.

12. **Mr. Castello** (United States of America) recommended replacing the word "be" with "become" in the second sentence of paragraph 24, to avoid unintentionally implying that only those arbitrators who were familiar with arbitration law could be appointed.

13. *It was so agreed*.

14. **Mr. Jacquet** (France) proposed that wording along the lines of "It was stated, however, that the law governing the place of arbitration did not apply with respect to the capacity of counsel in international arbitration" should be added at the end of paragraph 26.

15. *It was so decided*.

16. **Mr. Apter** (Israel) requested that paragraph 27 be amended to read "In relation to paragraph 30, it was suggested that parties and the arbitral tribunal should consider that holding all hearings outside of the place of arbitration might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award in certain jurisdictions."

17. *It was so agreed*.

18. **Mr. Jacquet** (France) indicated that in the French version of the document, the term "révision judiciaire" was not equivalent to the English term "judicial review". He therefore suggested that the French term should be replaced with "recours contre la sentence".

19. **The Chair**, noting that the English term had been translated incorrectly in the Spanish version of the document also, said that that matter would be addressed.

20. He proposed shortening the second sentence of paragraph 29 to "It was explained that such support or services might not be available from all arbitral institutions." to more accurately reflect the fact that the services provided by institutions varied.

21. *It was so agreed*.

22. **Ms. Jamshon Mac Garry** (Argentina) said it was not clear that the first and second sentences of paragraph 33 referred to separate suggestions that had been made during the Commission's deliberations. She therefore suggested that the beginning of the second sentence should be amended to clarify that fact.

23. **The Chair** wondered whether the second sentence of the paragraph in fact failed to reflect the Commission's discussions and whether the final part of that sentence should be amended to read "would not be prevented from providing assistance in legal research".

24. **Ms. Montineri** (Secretariat) said that the paragraph was intended to reflect the fact, as had been pointed out during the Commission's deliberations, that in certain types of arbitration secretaries drafted the award and provided legal advice. However, in order to clarify that that was not the usual practice in commercial arbitration, she suggested that the words "in certain types of arbitration" should be inserted after the word "secretaries".

25. **Mr. Schoefisch** (Germany) suggested that it might be clearer to state that the fact that secretaries were not lawyers did not prevent them from providing legal advice, and that the provision of legal advice applied only to situations in which the arbitrators themselves were not lawyers.

26. **Ms. Montineri** (Secretariat) said that the paragraph might be interpreted too broadly if reference was made to arbitrators, because in arbitration proceedings an arbitrator might not be a lawyer, but that did not mean that a secretary would give legal advice. The matter had been discussed with the delegation of Austria, which had explained that under Austrian law, there was a very specific type of arbitration which dated back 40 years, but which continued to apply. She suggested, in the light of the comments made, that the second sentence of the paragraph should be amended to read "In that context, yet another suggestion was that if that general principle were to be stated, the revised draft Notes should make it clear that the secretaries in certain types of arbitration would not be prevented from providing legal advice to the arbitral tribunal."

27. *It was so decided*.

28. **The Chair**, referring to paragraph 35, suggested reformulating the text following the words "for example," so that the text read "(for example, when the fees and expenses of the arbitral tribunal were set by the arbitration institution). Moreover, the arbitral tribunal would have no control over the legal costs incurred by the parties." The text could then continue as before.

29. He also proposed amending the second sentence of paragraph 35 to read "A number of suggestions were made that the draft revised Notes should emphasize and elaborate further on the meaning of "reasonableness" not only with respect to cost and fees of the arbitral tribunal, but also when deciding that a party was entitled to compensation for some or all of its cost".

30. *It was so agreed*.

31. **Mr. Jacquet** (France), referring to the final sentence of paragraph 37, asked whether it was correct to say that an arbitral tribunal could make a decision on the cost and its allocation subsequent to the final award.

32. **The Chair** explained that that practice existed in certain countries and had been inspired by the practice of tribunals in the United Kingdom, which left the decision regarding the cost and its allocation to a specific official subsequent to the final award.

33. **Mr. Jacquet** (France) asked whether or not that official was an arbitrator.

34. **The Chair** explained that in that type of arbitration, a decision was reached on principle, and the lawyers needed to know the outcome of that decision so that they could decide on the distribution of the cost. The Commission had wished to signal in the Notes the existence of that practice.

35. **Mr. D'Allaire** (Canada), describing the conclusion in paragraph 38 as overly categorical, proposed replacing the words "there would be no benefit addressing" with "as such it was not necessary to address".

36. **The Chair**, also referring to paragraph 38, said that he did not think the words "that matter would be dealt with under the relevant domestic law" were appropriate. He therefore suggested replacing them with "it was not necessary to address that matter in the draft notes".

37. *It was so decided*.

38. *Document A/CN.9/XLVIII/CRP.1/Add.1, as orally amended, was adopted*.

A/CN.9/XLVIII/CRP.1/Add.2

39. **The Chair**, drawing attention to paragraph 1, said that the words "an arbitral tribunal would request parties" were overly specific, and suggested changing the text to read "normally the parties are requested". He further suggested the addition of wording along the lines of "that had to be taken care of by the arbitral tribunal" after the words "and then address instances where such deposit would not be handled by an arbitral institution" to make the intended meaning clear.

40. With regard to paragraph 3, he said it was important to reflect the fact that costs followed events. Therefore, he suggested placing a full stop after the first mention of "cost allocation" and inserting a new sentence that read "Mention should be made of the widely applied principle of 'cost follow the event'". The words "and therefore to

redraft paragraph 46 along the following lines" could then be replaced by a sentence that read "The remainder of paragraph 46 could be redrafted along the following lines".

41. He suggested inserting the word "abusive" in the second sentence of paragraph 3, so that the text read "Conduct so considered might include a failure to comply with procedural orders or a party's abusive procedural requests".

42. He also proposed the addition of a sentence at the end of the paragraph, which would read "In order to hold this against the party, the tribunal might have to find that the requests were unreasonable." Those changes would more accurately reflect the fact that procedural requests might themselves be fully justified, even if they took time and entailed further costs, and that a party would not be punished simply for making procedural requests. The amended text would also accurately reflect the idea that if a party had caused extra costs to be incurred, that party would have to bear those costs.

43. With regard to paragraph 7, he proposed that the words "under the applicable law of their respective jurisdiction" should be replaced with the words "under the law applicable to them or to their counsel in their respective jurisdiction" in order to reflect the fact that the obligations of the parties and counsel with respect to confidentiality differed.

44. *It was so decided*.

45. **Mr. Castello** (United States of America) expressed concern that paragraph 14 did not entirely reflect the discussions regarding the deletion of the provisions on the form of interim measures. He therefore proposed that the first sentence should be replaced with the following wording: "It was further suggested that the draft revised Notes should not seem to encourage the issuance of interim measures in the form of an award (which was usually deemed final and binding) after emphasizing the temporary nature of such measures. It had also been suggested that the revised Notes should not include any provisions on the form of interim measures."

46. **Ms. Montineri** (Secretariat), welcoming that suggestion, said that the proposed wording also resolved the difficulty encountered by the Commission in addressing the issue of interim measures in such a way as to ensure that the Notes did not conflict with the provisions of the UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006.

47. *It was so agreed*.

48. **The Chair**, referring to the third sentence of paragraph 26, suggested that the words ", depending on the context," should be inserted before the words "the arbitral tribunal might need to take caution in raising such concerns".

49. In respect of paragraph 32, he suggested replacing the words "to take into consideration the interest" with "to balance the enforcement of procedural rules with the interest of the parties" to reflect the fact that it was not only a question of the interest of the parties but also of an interest in retaining a degree of discipline with regard to the proceedings.

50. *It was so decided*.

51. **Mr. Castello** (United States of America), referring to paragraph 34, proposed that the words "that the tribunal has ordered a party to produce" should be inserted after the words "failure to produce evidence" in order to draw a distinction between the two situations that had been clarified in the Commission's earlier discussions, i.e., adverse inferences could be drawn only in situations where a party had failed to produce evidence that it had been ordered to produce, whereas if a party had simply failed to voluntarily produce evidence that supported its case, the tribunal would be able to rule on the evidence before it.

52. With reference to paragraph 35, he proposed that the words "requested to produce documentary evidence failed to do so" should be replaced with the words "failed to produce voluntarily evidence to support its case", since the situation in which a party was requested to produce evidence but failed to do so would, as was already indicated at the end of the paragraph 35, be addressed separately in relation to paragraphs 75 and 76 of the revised Notes.

53. **Ms. Montineri** (Secretariat) said that the intention of paragraph 34 had been to address the distinction between situations in which parties participated in the proceedings but failed to produce evidence, whether or not they had been requested to do so, and situations in which a party did not participate in the proceedings. On the other hand, the intention of paragraph 35 had been to distinguish between the two situations outlined by the representative of the United States.

54. **The Chair** recalled in that regard that concern had been expressed that adverse inferences might be drawn from a party's failure to produce evidence even if that party was not participating in the proceedings. The proposal of the representative of the United States might therefore be inappropriate. By way of clarification, he said that there were three situations to consider: the first, which involved the failure of a party to produce evidence and non-participation in the proceedings, was covered in paragraph 34, while the other two situations were covered in paragraph 35, which addressed the consequences of failure of a party to produce evidence voluntarily and the consequences of failure of a party to comply with a request to produce evidence. He asked whether it would be acceptable to the delegation of the United States if paragraph 35 was amended as proposed but paragraph 34 was not.

55. **Mr. Castello** (United States of America), welcoming that clarification, said he agreed with the Chair's suggestion. The only remaining difficulty with paragraph 34 was that it was not clear from the beginning that the paragraph related to non-participation in the proceedings.

He asked whether the provision also applied if the failure to produce evidence was the result of non-participation.

56. **Ms. Montineri** (Secretariat) said that as the draft revised Notes currently stood, the arbitral tribunal did not draw inferences when a party was not participating in the proceedings. On the other hand, when a party was participating but did not produce evidence, it was at a greater disadvantage than the non-participating party. That point would require clarification in the draft revised Notes. Paragraph 74 of the draft revised Notes addressed situations in which a party was ordered to produce documents but failed to do so. In conclusion, that paragraph would require revision, and the Secretariat would need to consider how to address those issues.

57. **The Chair** said that the drafting of the first part of paragraph 34 of document A/CN.9/XLVIII/CRP.1/Add.2 was problematic as the current wording did not convey the idea that inferences would only be drawn by the arbitral tribunal where it had issued an order to produce evidence. While it would be desirable to distinguish between the production of or failure to produce documents and the non-participation of a party, care would need to be taken in how that was expressed to avoid suggesting that inferences could be drawn in a more general manner. He suggested leaving the redrafting of paragraphs 34 and 35 to the Secretariat on the basis of the discussion at the current meeting.

58. **Mr. Castello** (United States of America) expressed full agreement with the Chair. He said that reference should be made in paragraph 35 to the situation in which a party that had been specifically ordered to produce evidence but had failed to do so, in order to provide a strong contrast with the other situation.

59. **The Chair** asked the United States to read out its proposed wording to give the Secretariat an idea of the direction it should take in its redrafting. However, he reiterated that the specific wording should be left to the Secretariat.

60. **Mr. Castello** (United States of America) proposed the deletion of the word "such" before "failure", and the insertion of "to produce specific evidence that is ordered disclosed by the tribunal". He also pointed out the missing "with" after the word "dealt" in the final line.

61. **Ms. Montineri** (Secretariat) said that in paragraph 34, the distinction would be clarified between situations in which parties participated in the proceedings and situations in which a party did not participate. The proposed change would be made to the wording of paragraph 35.

62. *Document A/CN.9/XLVIII/CRP.1/Add.2, as orally amended, was adopted*.

The discussion covered in the summary record was suspended at 10.55 a.m. and resumed at 12.20 p.m.

A/CN.9/XLVIII/CRP.1/Add.3

63. **Mr. Castello** (United States of America) said that paragraph 3 of document A/CN.9/XLVIII/CRP.1/Add.3 did not accurately capture the point made by the Chair during the Commission's discussions relating to paragraph 81 of the draft revised Notes that at the outset of a proceeding it was often difficult to know whether a joint set of documents would be useful. He therefore suggested replacing the words "normally be discussed" with the words "often not be resolved", and replacing the word "and" with the words "but rather".

64. *It was so agreed*.

65. **Mr. D'Allaire** (Canada) proposed the addition of the words ", in particular with respect to issues that could arise with the preservation of data" at the end of the final sentence of paragraph 2.

66. *It was so decided*.

67. **Mr. D'Allaire** (Canada), referring to the final sentence of paragraph 7, suggested the deletion of the words "because such requirements and practices varied widely", since that could imply that it was acceptable practice to conceal the identity of the expert.

68. *It was so decided*.

69. **Mr. D'Allaire** (Canada) said that the purpose of the second sentence of paragraph 8 was to reflect the suggestions made during the Commission's discussions. He therefore proposed the deletion of the word "however", and the addition at the end of the sentence of wording along the lines of "and that this element should be kept in the recast version of this section".

70. *It was so agreed*.

71. **Mr. Castello** (United States of America), referring to paragraph 14, suggested the amendment of point (ii) to read "provide that to the extent that witnesses were not allowed in the hearing room, it would be important that such witnesses also not have access to any contemporaneous transcripts of the hearings".

72. *It was so decided*.

73. **Mr. Lee Yongil** (Republic of Korea), referring to paragraph 19, suggested inserting the words "by the party calling the witness" immediately after the second instance of "re-examination", to distinguish between the first instance of "re-examination", involving re-examination by the cross-examining party, and the second instance, involving re-examination by the party that had originally examined the witness.

74. *It was so agreed*.

75. **The Chair** suggested the addition to paragraph 19 of a new second sentence reading "It was observed that this would occur only as an exception, and that normally the examination by the parties ended with a redirect examination", and the replacement of the word "Accordingly" in the following sentence with the words "However, it was agreed".

The meeting rose at 12.30 p.m.

Summary record (partial) of the 1007th meeting
Held at the Vienna International Centre, Vienna, on Friday, 3 July 2015, at 2 p.m.

[A/CN.9/SR.1007]

Chair: Mr. Reyes Villamizar (Colombia)
Later: Mr. Schneider (Vice-Chair) (Switzerland)

The meeting was called to order at 2 p.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/XLVIII/CRP.1/Add.1-3)

1. **The Chair** invited the Commission to resume its consideration of the parts of the draft report concerning the draft revised Notes on Organizing Arbitral Proceedings.

Mr. Schneider (Switzerland), Vice-Chair, took the chair.

*A/CN.9/XLVIII/CRP.1/Add.3 (*continued*)*

2. **Mr. Bellenger** (France), referring to paragraph 19 of the document, said that he did not recall a conclusion having been reached with regard to cross-examination and further questioning of the witness. The discussion that had taken place had focused on adding wording to the effect that the cross-examining party could further question the witness after cross-examination, if the party so requested, although that was not standard practice. However, the impression should not be given that the party that had carried out the cross-examination had an automatic right to further question the witness.

3. **Mr. D'Allaire** (Canada) suggested replacing the words "it was agreed" with "it was said" in order to address that concern.

4. *It was so decided*.

5. **Mr. Bellenger** (France), drawing attention to the last sentence of paragraph 19, said that there should not be too many caveats or limitations in the text; re-examination was a right.

6. **Mr. D'Allaire** (Canada) suggested adding the words ", where a reference to the expression 'experts appointed by the tribunal' is used" to the end of the first sentence of paragraph 25. He also suggested deleting the words "and therefore, needed to be elaborated in the draft revised Notes" from the end of the last sentence of that paragraph, because his delegation did not recall such a decision.

7. **Mr. Schoefisch** (Germany) said that that wording was based on comments made by his delegation; however, he did not oppose its deletion.

8. **Mr. D'Allaire** (Canada) said that the Notes were intended to reflect different practices but, in the light of the clarification provided by the representative of Germany, his delegation would not insist on the deletion of the phrase in question.

9. **Mr. Schoefisch** (Germany) proposed that the word "needed" should be replaced with the words "it might be useful for it" in order to reflect the comments made.

10. *It was so decided*.

11. **Mr. D'Allaire** (Canada) suggested that a new sentence should be added to the end of paragraph 25, to read "It was suggested to refer to the practice of requiring experts to detail their expertise by providing a resumé or a list of recent experience."

12. *It was so decided*.

13. **Mr. D'Allaire** (Canada) suggested adding the words ", but agreed that the text could reflect the ability to present formal as well as informal submissions" at the end of paragraph 30.

14. *It was so decided*.

15. **Mr. D'Allaire** (Canada) suggested replacing paragraph 31 with the wording "It was said that, under some systems of law, expert opinions were treated as evidence by the arbitral tribunal".

16. **The Chair** said that the proposed wording might be useful but, as the question referred to in the paragraph had indeed been raised, the original wording should not be changed.

17. Drawing attention to paragraph 33, he suggested amending the second sentence to read "It was agreed that the draft revised Notes should point out that arbitral tribunals may wish to ensure that they are not held responsible in case the remuneration exceeds the amount initially indicated."

18. *It was so decided*.

19. **The Chair** suggested that, in the fifth sentence of paragraph 36, the words "throughout the entire hearing process" should be replaced with "throughout the entire arbitration process".

20. *It was so decided*.

21. *A/CN.9/XLVIII/CRP.1/Add.3, as orally amended, was adopted.*

The discussion covered in the summary record ended at 2.20 p.m.

Summary record (partial) of the 1011th meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 8 July 2015, at 2 p.m.

[A/CN.9/SR.10011]

Chair: Mr. Reyes Villamizar (Colombia)

The discussion covered in the summary record began at 3 p.m.

Online dispute resolution: progress report of Working Group III (*continued*) (A/CN.9/827, A/CN.9/833, A/CN.9/857 and A/CN.9/858; A/CN.9/WG.III/WP.121)

Work programme of the Commission (A/CN.9/841 and A/CN.9/850)

1. **The Chair** recalled that the Commission, at its 998th meeting, had decided to address certain aspects of the work of its working groups under agenda item 18, and at its 1007th meeting had commenced but not concluded its discussion of the groups' mandates. He therefore invited the Commission to resume its consideration of future work in the area of online dispute resolution.

2. **Ms. Nicholas** (Secretariat), referring to the reports of the thirtieth and thirty-first sessions of Working Group III, contained in documents A/CN.9/827 and A/CN.9/833, respectively, recalled that while significant progress had been made with regard to some aspects of the draft procedural rules on online dispute resolution for cross-border electronic commerce transactions, significant disagreement remained, particularly as to whether pre-dispute agreements to arbitrate should be binding as a question of consumer protection. Since the Working Group's thirty-first session, there had been attempts to make progress through informal consultations. As a result, two proposals had been submitted for consideration by the Commission, one of which had been presented by the representative of Israel the previous week (A/CN.9/857). That proposal had recommended a different approach to non-binding rules, such as notes on organizing online dispute resolution proceedings.

3. The delegation of Israel had strongly objected to the proposal to terminate the mandate of the Working Group, and had said that the following two sessions of the Working Group could be used to work on a non-binding instrument. The delegation of Germany had supported the proposed termination of the mandate of the Working Group in view of the Group's lack of results.

4. The Chair of the Working Group had provided a detailed summary of the Group's progress and had stressed that its original mandate had been to consider a range of means, including arbitration both for business-to-business and business-to-consumer transactions in the context of online dispute resolution. However, there was a lack of clarity regarding the precise scope of that mandate. The Working Group had been established to harmonize existing practices in online dispute resolution. Nevertheless, there were questions regarding whether the concept should encompass online arbitration, mediation and conciliation, and other issues remained unresolved. Difficulties had been encountered in respect of pre-dispute agreements to arbitrate, which had led to the preparation of two sets of rules, known as the "two tracks". The consolidation of those rules had now been proposed by the delegation of China in document A/CN.9/833. Although there was also disagreement regarding that proposal, the fact that it remained on the table meant that certain delegations were disinclined to terminate the mandate of the Working Group. It should be clarified whether the Working Group's mandate pertained to rules or to a range of transactions, and whether it included both business-to-business and business-to-consumer transactions. The delegation of Colombia had said that the mandate might be reshaped and that the suggested text might be changed to a non-binding instrument. The delegation of China had noted that progress had been made during the Working Group's five years of discussions, and there were indications that the fundamental difference between certain delegations could perhaps be resolved by reference, for example, to commercial practices; the Commission should therefore mandate the Working Group to continue its work.

5. **Mr. Kim** (United States of America) said that he agreed with the view expressed at the Commission's 1007th meeting that the Working Group had been unable to resolve fundamental public policy differences regarding pre-dispute arbitration in the consumer context. It seemed unlikely that the Working Group would make progress on the draft procedural rules for online dispute resolution. He agreed with the Chair of the Working Group that the Group had a broad mandate that enabled it to address online dispute resolution through various means. He shared the view expressed by many developing countries at the thirty-first session of the Working Group that the work on online dispute resolution should continue to a productive end. He agreed with the delegations of China, Colombia and Israel that the Working Group had reached consensus on a broad range of technical issues that were relevant to the proposed instrument on online dispute resolution, whatever form that instrument eventually took. He shared the view expressed by the delegations of China, Colombia, Israel and Singapore that it was important not to lose the benefits of all the Group's work and accumulated learning. Therefore, in view of the lack of progress on the draft procedural rules for online dispute resolution, the key question was how to achieve a productive outcome in an efficient manner, within no more than two sessions of the Working Group. His delegation had submitted a proposal, contained in document A/CN.9/858, alongside the delegations of Colombia and Honduras, regarding the preparation of notes on organizing online dispute resolution proceedings as a way to achieve an efficient and productive outcome after many years of efforts. The instrument would be a non-binding, soft-law instrument, and would be of a technical and explanatory nature, thereby enabling the Working Group to benefit from the

resolution of a range of technical issues which had already been agreed while avoiding the public policy debates that were the basis of the impasse on the draft procedural rules for online dispute resolution. The goal was to produce a fair, neutral and balanced text in no more than two sessions of the Working Group, which did not favour the practice of one jurisdiction or another. The focus should not be on the name or title of the text, but on establishing a non-binding document that addressed the technical issues. He urged other delegations to join together and endorse the technical progress made in a productive and efficient manner for the benefit of States looking to UNCITRAL to play a role as a critical source of guidance in global online dispute resolution.

6. **Mr. Mirza** (Pakistan) expressed his full support for the proposal of the delegation of China, and said that Working Group III should proceed with its work on the matter under consideration. It was an important matter for developing nations; the results would be beneficial to everyone.

7. **Mr. Morav** (Israel) said that he joined the delegations of Colombia, Honduras and the United States in calling on Working Group III to develop a non-binding instrument for use by providers and neutrals in order to assist and support practitioners of online dispute resolution. In that regard, he supported the proposal submitted by those delegations, which reflected many of the elements of the proposal submitted by his delegation.

8. **Mr. Ngugi** (Kenya) expressed his support for the two proposals submitted respectively by the delegation of Israel and the delegations of Colombia, Honduras and the United States. The work of Working Group III was of significance to developing countries and was ongoing. Despite the fact that policy-related issues, such as consumer protection and pre-dispute arbitration agreements, might not be resolved, he agreed with the Chair of the Working Group that tremendous progress had been made on other issues, and the disagreement in certain areas had narrowed. The establishment of a time limit for the Group's work, as proposed by the delegation of the United States, could be considered.

9. **Ms. Strasser** (Austria) said that the progress made by Working Group III to date should be regarded as a separate issue from that of its future work. The Group had made progress over the previous five years, and delegations had endeavoured to reach a consensus on the controversial issue of the validity of pre-dispute arbitration agreements in the context of consumers, with the submission of various compromise-oriented proposals. Examples included the proposal of the Chinese delegation, the "two-track" proposal of the delegation of the European Union contained in working paper A/CN.9/WG.III/WP.121, and the "second click proposal" referred to in document A/CN.9/833, none of which were accepted by all delegations. Most recently, the proposal of the Chinese delegation, which had seemed to have the potential for securing the consensus of all delegations, had turned out to be interpreted in very different ways. Priority should be given to resolving the impasse relating to the present work of the Group before the two proposals submitted respectively by the delegation of Israel and the delegations of Colombia, Honduras and the United States were discussed. She requested an update from the Secretariat on the outcome of the intersessional consultations. Although the delegation of Austria had been optimistic that a consensus could be reached, it appeared that delegations were still far from doing so.

10. **Mr. Sorieul** (Secretary of the Commission) said that the separation of items 7 and 18 would complicate the discussion further. It was important to reach a conclusion with regard to the work of Working Group III under its current mandate. The nature of the Group's work at future sessions should also be discussed. The Commission, as the body overseeing the Working Group, should determine whether, on the basis of the progress made by the Group over the previous five years, the draft procedural rules for online dispute resolution could be approved as they stood.

11. **Ms. Nicholas** (Secretariat) said that at the conclusion of the thirty-first session of Working Group III, the delegation of Egypt had offered to coordinate any proposals and consultations. However, the Secretariat had not received an update regarding any such consultations.

12. **Mr. Ahmed** (Observer for Egypt) said that although the delegation of Egypt had attempted to make progress on a number of matters, the lack of responses and the small number of proposals submitted, which had contained ideas that had already been discussed at previous sessions, had made that task impossible.

13. **Ms. Jamshon Mac Garry** (Argentina) expressed her support for the proposals submitted by the delegation of Israel and by the delegations of Colombia, Honduras and the United States. While Working Group III had not reached a consensus on a rules-based instrument, progress had been made on the text, and constructive results had been achieved over the course of the Group's work. That work should therefore continue.

14. **Mr. Schoefisch** (Germany) expressed doubt that progress would be made on the draft procedural rules for online dispute resolution or that a useful result would be achieved: although Working Group III had been working on the matter for five years, the main topic was still under discussion. Therefore, in the interest of making best use of the capacities of the Secretariat and Member States, the Group should not proceed with its work. However, it appeared that many delegations felt otherwise. If the Commission decided that the Group's work should continue, a time limit of one year should be set for results to be produced.

15. **Mr. Maradiaga** (Honduras) said that he agreed that it was important for UNCITRAL ultimately to produce a document, and for a result to be achieved within a reasonable period of time. Despite the large amount of time and effort expended to date, it was vital to remain positive.

16. **Mr. Bellenger** (France) expressed his full agreement with the delegation of Germany. The key issue was whether Working Group III was in a position to continue its work. The answer to that lay in the progress made by the Group over the previous five years; it would be impossible for the Group to accomplish in the coming year what it had failed to accomplish over the previous five.

Moreover, the previous year, the Group had been told that there were just a few more sessions available to it in which to accomplish its objective, but it had failed to do so. The work of Working Group III should therefore cease. It was incumbent upon the Commission, to which Working Group III was subordinate, to show responsibility and self-discipline, and to take the requisite decision.

17. **Ms. Lanari** (Switzerland) said that while she recognized the importance of the work carried out to date by Working Group III, she was concerned by its lack of progress and failure to reach a consensus. Like the delegation of Germany, she doubted that a consensus would be reached in the near future. Accordingly, if the decision was made to continue with the Group's work, it was important to set a time limit for its completion, and to resolve the impasse in no more than two sessions.

18. **Mr. Lee** Yongil (Republic of Korea) said that his delegation found it difficult to accept rules that would give effect to binding pre-dispute arbitration agreements, as such provisions might be incompatible with his country's domestic legislation. However, he encouraged Member States to reach a consensus on the matter despite the complexity of the issues raised.

19. **Ms. Laborte-Cuevas** (Philippines) said that Working Group III should be given the opportunity to consider the new proposals submitted in order to find a way forward on outstanding issues. She encouraged the Group to continue to explore a range of means and to conduct its work in the most efficient manner. The proposal to terminate the Group's mandate could be discussed at future sessions of the Commission.

20. **Mr. Leinonen** (Observer for Finland) expressed his concern regarding the lack of progress of Working Group III. It was understandable that the delegations taking part in the Group were optimistic about achieving an outcome in the near future. However, it was important to bear in mind that the Commission was responsible for ensuring that the resources of UNCITRAL and the Secretariat were used efficiently to achieve results-oriented work. His delegation supported the termination of the Group's mandate, but was willing to accept its continuation for one more year, provided that that time limit was clearly stated in the report.

21. **Ms. Bereczki** (Hungary) said that as it had not been possible to reach a compromise on substantive issues, she too believed that the project should be terminated. However, she could accept the continuation of the Group's work provided that a time limit was set for the sake of effectiveness.

22. **Mr. Sukprasit** (Thailand) expressed his delegation's support for the proposal submitted by China, which represented a solution that was a compromise and could form the basis for continued discussions in Working Group III regarding the draft procedural rules for online dispute resolution.

23. **Mr. Bireije** (Uganda), noting that much of the work of Working Group III remained unresolved, said that the Group should be allowed to continue, subject to the establishment of a specific period within which to complete its work.

24. **Ms. Laursen** (Denmark) said that the work of Working Group III should be discontinued. However, if the majority of delegations felt otherwise, a time limit on that work should be set and noted in the report.

25. **Mr. Wijnen** (Observer for the Netherlands) said that in view of the fact that Working Group III had been unable to reach a consensus despite five years of work and the compromises contained in the proposals submitted by the delegations of the European Union and China during that time, the best course of action would be to terminate the mandate of the Group forthwith in order to preserve the resources of UNCITRAL and Member States. Nevertheless, if the Commission ultimately decided that the Working Group should continue with its work, the Commission should set a time limit for that work and clearly state what the Group should aim to achieve within that time, to avoid the next two sessions being devoted to fruitless discussions regarding the two proposals submitted respectively by the delegations of Israel and of Colombia, Honduras and the United States.

26. **Mr. Márquez García** (Colombia) drew attention to the proposal submitted by his delegation and the delegations of Honduras and the United States, and said that the proposal's main thrust was that the Working Group should be instructed to shift the focus of its work from rules to a non-binding document, such as "notes on organizing online dispute resolution proceedings", based on the text that had already been agreed upon, in order to achieve a definite outcome. It was important that the non-binding document should preserve the work already carried out by the Working Group on a wide range of technical issues relating to online dispute resolution, and promote good international practices in that area. Furthermore, such an instrument would facilitate access by micro- and small-sized enterprises to international markets through electronic and mobile platforms, although greater trust in cross-border electronic commerce would be necessary in order to achieve that objective.

27. **Ms. Faber** (Observer for Luxembourg) said that the Group's mandate should be terminated given that a consensus on the fundamental issue had not been reached over the previous five years, that the new proposals submitted did not provide a solution to that issue, and that it was the Commission's responsibility to ensure that efficient use was made of the resources available to UNCITRAL. A time limit of one year should be set, after which the Group's work should be discontinued if it had proved impossible to reach a consensus.

28. **Mr. Mita (**Japan) expressed his support for the proposal submitted by the delegations of Colombia, Honduras and the United States.

29. **Mr. Sorieul** (Secretary of the Commission) said that it would be undesirable to postpone a decision regarding the work of Working Group III for a further year, as it was likely that that would only result in deadlock once again. While it was tempting to impose a deadline for reaching a consensus, that approach had already been attempted,

without result. As suggested by the representative of Colombia and other delegations, it might be appropriate to refocus the Group's current project in such a way as to preserve the progress of the Working Group to date, an objective supported by representatives of many regions in the face of what was essentially a political objection — something that was rare in the Commission — to the project by a limited geographical group of States.

30. **The Chair** said that a summary would be drawn up of the various proposals and options that had been suggested.

31. **Mr. Leong** (Singapore) said that it was important to remember that Working Group III was currently considering a live proposal in the form of the proposal of China, which had been submitted less than one year previously. Although there had been disagreements, the Group had resolved many differences in opinion before. He called for greater flexibility in the Group's approach in future. The Group should be allowed to continue to explore a range of means to address online dispute resolution. If the Group were to decide that the proposal of China was not workable at the following meeting, then it could move on to considering the other proposals that had been submitted.

32. **Mr. Cervera Martínez** (Mexico) said that his delegation was in favour of giving Working Group III a degree of flexibility to analyse the new proposals submitted, while establishing a deadline for the Group to reach a consensus.

33. **Mr. Schoefisch** (Germany), referring to the comments of the Secretary regarding the objection of a "limited geographical group of States", said that the delegation of the European Union was entitled to take a position that reflected its interests, and had, furthermore, proposed a number of possible solutions. His delegation was concerned by suggestions to discontinue the discussion regarding consumer protection and instead to refocus the Group's project, because consumer protection was of the utmost importance and was a significant issue within online dispute resolution. If consumer protection was excluded from the project, the Working Group would no longer be relevant.

34. **Mr. Decker** (Observer for the European Union) said that the participation of the European Union in the United Nations was based on General Assembly resolution 65/276 awarding the European Union special observer status. Given the involvement of the European Union in Working Group III, it would be of benefit to the Commission, and in line with General Assembly resolution 65/276 and established practice, to honour the role of the European Union and allow its delegation to make a statement in chronological order just like any other delegation with an important contribution to make.

35. The European Union was committed to and had invested a great deal of effort in the project. It had submitted two compromise proposals in the course of the negotiations, namely the "two-track approach" set out in working paper A/CN.9/WG.III/WP.121, and the "second click proposal" in paragraphs 142 et seq. and accompanying diagram in paragraph 149 of the report of the thirty-first session of Working Group III (A/CN.9/833). However, since two delegations had differed in their interpretation of the proposal made by the delegation of China, it was unlikely that a consensus could be reached.

36. He fully agreed with the delegation of Germany regarding the comments of the Secretary that progress had been blocked by a limited geographical group of States. Those comments did not reflect the Working Group's discussions. The Chair of the Working Group had stated that a large majority of the Group's members had been willing to move forward on the understanding that the proposal of China allowed for arbitration agreements only after disputes had arisen, but two delegations had insisted that the draft procedural rules for online dispute resolution should provide for pre-dispute arbitration, which posed a problem for many countries around the world.

37. With regard to the continuation or otherwise of the Group's mandate, he echoed the views of the delegations of Finland and the Netherlands that it was important to assess whether there was a prospect of the Working Group reaching a compromise on the project. While acknowledging the good intentions behind the two proposals submitted respectively by the delegations of Israel and of Colombia, Honduras and the United States, it was difficult to see how those proposals could achieve a useful outcome within a reasonable time frame. It would therefore be more realistic to terminate the Group's mandate. After five years of work without a result, the burden of proof regarding the capacity of Working Group III to achieve a useful outcome should lie on those who wished to continue. The decision to terminate the mandate of a working group was a difficult one, but unless there was sufficient evidence that a group had the ability to achieve a work product within a set period of time, it was appropriate to take responsibility, be realistic, and recognize that the resources of all delegations and the Secretariat would be better used elsewhere.

38. The proposal of the delegation of Colombia to prepare notes on organizing online dispute resolution proceedings referred to the current work of Working Group II on the revised UNCITRAL Notes on Organizing Arbitral Proceedings. However, that reference was inappropriate because there was a fundamental difference between them. The Notes on Organizing Arbitral Proceedings were based on three main UNCITRAL texts — the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006, and the UNCITRAL Arbitration Rules as revised in 2010 — and attempted to show how the three texts should work in practice. They were based on an existing legal body and an existing legal framework for arbitral proceedings. In contrast, there was no UNCITRAL or other legal framework for online dispute resolution that could be applied globally. The current reality was very diverse, as had been discovered during the years of discussions. The preparation of notes on online dispute resolution proceedings raised the question of whether such a document would be appropriate, as it would encourage existing practices without establishing a standard for them. Moreover, the Working Group would run a high risk of

encountering the same fundamental issues under a different heading. He therefore doubted that the preparation of notes or some other document would lead to useful and tangible results within a reasonable period of time.

39. **The Chair**, referring to the comments of the representative of the European Union, said that he had been applying rules 106 et seq. of the UNCITRAL rules of procedure and methods of work (A/CN.9/638) very strictly in relation to deliberations and the delivery of statements.

40. **Mr. Sorieul** (Secretary of the Commission) said, as a point of clarification, that he had not been targeting the European Union specifically; he had merely been referring to a geographical group of countries, which he was certain would give due consideration to the suggestions made by the delegations of developing countries. He reassured the representative of the European Union that the Commission was not ignorant of General Assembly resolution 65/276, and emphasized that a great deal of thought had been devoted to the position of the European Union within the United Nations. Like Member States, the European Union was welcome to express its views at meetings of the working groups and the Commission. The debate that had taken place over recent days had demonstrated the ability and willingness of UNCITRAL Member States to express themselves without preventing observers from making statements. He was therefore confident that participants in the discussion had been respected in accordance with the normative texts.

41. **Mr. Zhang** (China) reiterated the view expressed by his delegation at the Commission's 1007th meeting that Working Group III should be allowed to continue with its important work in spite of the substantive issues it had encountered. The Group had originally been mandated by the Commission to establish a set of rules for online dispute resolution, precisely because although it was a global issue, laws on online dispute resolution differed from country to country. A set of rules was important for both developed and developing countries given the growth in online transactions and the corresponding increase in online disputes. The delegation of China had been supportive of the Group's work over the previous five years, and believed that great progress had been made by Member States with the help of the Secretariat. Agreement had been reached on many issues, as demonstrated by the text. The delegation of China stood ready to work with the other delegations to resolve issues and strive for substantial progress through a more active approach.

42. **Mr. Lapiere** (Observer for Belgium) said that his delegation supported the idea of setting a time limit for the current activities of Working Group III. He highlighted the importance of the participation of the European Union in the Commission's deliberations.

43. **Mr. Morav** (Israel) welcomed the flexibility shown by representatives in the current deliberations and in their consideration of the proposal submitted by his delegation. He reiterated his support for the other proposal submitted by the delegations of Colombia, Honduras and the United States. Working Group III should be given a broad mandate to re-examine the feasibility of all the proposals submitted. The Group should begin its thirty-second session by determining which of the proposals submitted by that date was the most feasible, and commence its work on that basis. At its forty-ninth meeting, the Commission could then review the Group's progress and decide how to proceed.

44. **Mr. Chan** (Singapore), speaking as Chair of the Working Group and responding to the comments on the amount of time the Working Group had taken thus far, recalled the explanation of the Secretary that unlike the other working groups, Working Group III had experienced sharp disagreement among its members on the basis of political outlooks. Although the Secretary had more experience than himself of discussions in other working groups, he had chaired the previous two sessions of Working Group III, and had been attending the meetings of the Working Group since its third session. The Chair of the Group at that time had apprised delegations of differences of opinion at a very early stage, and had made every possible effort to resolve them. He could have called for early agreement or a vote, but to preserve the integrity of the Group, he had persisted, seeking solutions and diligently encouraging delegations to work together. As already mentioned, a number of proposals had been submitted. It was owing to that long period of attempting to resolve a rare political difference that the Group had been unable to advance more swiftly. It was important to note that the majority of issues pertaining to online dispute resolution had been resolved, except for the most mundane of administrative matters.

45. The question was now how to move forward. Given that the proposal submitted by the delegation of China remained on the table, it would be at the very least discourteous to those who had invested so much in drafting that proposal to terminate the Group's mandate. If it was ultimately concluded that a rules-based instrument was not desirable, the mandate of Working Group III was broad enough to explore other means to provide for online dispute resolution, particularly for developing countries. In that regard, while some regional groups did not need rules because they already had their own harmonized laws, many other countries had disparate rules on online dispute resolution and would benefit from guidance on best international practices in that area.

46. **Mr. Schoefisch** (Germany), expressing his agreement with the representative of China that online business was expanding rapidly, especially in the area of consumer-to-business relations, asked the representative of China whether China's proposal dealt with consumer-to-business relations, which he understood to be the topic that the Working Group would be addressing if it were to proceed with its work.

47. **Mr. Zhang** (China) replied that the proposal of his delegation, the specific content of which could be found in the report of the thirty-first session of Working Group III (A/CN.9/833), comprised a complete set of unified rules and was aimed at resolving the ongoing issues facing the Group in relation to online dispute resolution. However, the proposal did not address the subject of consumer-to-business relations or the efficiency of arbitration rules,

because its purpose was not to devise policies, but to provide the parties with more choices to resolve disputes. The basis for drafting procedural rules for online dispute resolution was to combine best commercial practice and proceed in the best interests of resolving conflicts.

48. **Mr. Barbuk** (Belarus) said that although there was disagreement between countries regarding whether or not Working Group III should continue with its work, one common feature was that all delegations had attempted to reach a compromise. It would be inappropriate for the Group to discontinue its work of five years when countries were so close to achieving the necessary compromise. He therefore urged the members of the Group, in the coming year, to find common ground and agree on a compromise.

49. **Mr. Araújo** (Observer for Portugal), expressing support for the position taken by other States members of the European Union, said that over the years, Working Group III had attempted to reach a consensus, and many different proposals had been submitted without success. While the delegation of Portugal was willing to consider the views and concerns of all delegations, and did not question the importance of the topic, a decision needed to be made about how to better manage the Organization's scarce resources. It would be preferable to terminate the Group's mandate and direct those resources and efforts to other areas.

50. **The Chair** said that while there appeared to be consensus that Working Group III should continue its work subject to the establishment of a time limit for that work, further analysis was necessary. He therefore suggested that the Commission should resume its consideration of the agenda item at its next meeting.

51. *It was so agreed.*

The meeting rose at 5 p.m.

Summary record (partial) of the 1013rd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 9 July 2015, at 2 p.m.

[A/CN.9/SR.10013]

Chair: Mr. Reyes Villamizar (Colombia)

The meeting was called to order at 2.15 p.m.

Work programme of the Commission (*continued*) (A/CN.9/841, A/CN.9/850, A/CN.9/854, A/CN.9/856 and A/CN.9/858; A/CN.9/WG.I/WP.83; A/CN.9/WG.IV/WP.133)

Electronic commerce (continued)

1. **Ms. Masterton** (United Kingdom) said that her delegation supported the Secretariat's suggestion, made at the previous meeting, that the Secretariat should review the three proposals set out in documents A/CN.9/854, A/CN.9/856 and A/CN.9/WG.4/WP.133 over the course of the next year with a view to making a recommendation to the Working Group with regard to the order of priority of the topics concerned. In view of the comments made by other delegations, it seemed that those who were in support of work on identity management would also support clarification of the scope of that work before a mandate was given. The Secretariat's review would help the Commission to reach that more specific objective and, importantly, would clarify how those issues might overlap or complement one another. There was no doubt that taking the time at the current stage to clarify the mandate of the Working Group would save time in the future.

2. **Mr. Lapiere** (Observer for Belgium) said that his delegation likewise supported the Secretariat's suggestion. Drawing attention to paragraph 22 of document A/CN.9/854, he requested that consideration be given to the proposal set out in that paragraph to establish an informal group of experts to support the Secretariat in drafting legislative proposals relating to identity management and trust services, bearing in mind the Secretariat's limited budgetary resources.

3. **Ms. Sabo** (Canada) said it was her understanding that the Working Group could already begin discussing some of the proposed topics at its fifty-fourth or fifty-fifth session. It would be very useful for the Working Group to do so as soon as possible. It should be left to the Secretariat to decide whether to establish an expert group as proposed.

4. **Mr. Bana** (International Bar Association) said that his delegation fully supported the three proposals and stood ready to participate in and contribute to the preparatory work to be undertaken.

5. **The Chair** said he took it, on the basis of the comments made, that the Commission wished to accept the Secretariat's suggestion as to the manner in which Working Group IV should proceed. The Secretariat could prepare a report on its preparatory work on the three proposed topics for consideration by the Working Group at its fifty-fifth session, in May 2016.

6. *It was so agreed.*

Online dispute resolution (continued)

7. **Mr. Kim** (United States of America) said that it was clear from consultations with other delegations that there was no consensus as to how to proceed with regard to the draft procedural rules for online dispute resolution, but there was reluctance to continue that work indefinitely without result. There appeared to be support for the proposal presented by his delegation, together with the delegations of Colombia and Honduras, in document A/CN.9/858 for the drafting of notes on the organization of online dispute resolution proceedings, which would provide a foundation for the Working Group to achieve practical results within a short period of time. However, that tentative agreement was subject to certain caveats.

8. The first was that the Commission should instruct the Working Group to continue its work on elaborating a non-binding descriptive document reflecting elements of an online dispute resolution process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the online dispute resolution process, arbitration or non-arbitration. The second was that there should be a clear time limit of one year, after which the Working Group must conclude its work.

9. In addition, in order to ensure that those requirements were fulfilled, the Commission would need to address the timing of the Working Group's sessions. He therefore proposed swapping the tentative dates of the Working Group's forthcoming session with those of the forty-eighth session of Working Group V, meaning that the next session of Working Group III would be held from 14 to 18 December 2015.

10. **Mr. Marquez García** (Colombia), expressing support for those comments, said that it was important for the Working Group to continue its work for only a limited time. If the proposal was accepted, it would be helpful to move the dates of the Working Group's session as proposed in order to allow sufficient time to prepare the draft document.

11. **Mr. Sorieul** (Secretary of the Commission) cautioned that the likely consequence of the suggested change in dates of sessions was that Working Group V would face the same problem of having insufficient time to prepare for its next session. A possible solution would be to schedule just one session of Working Group III for the spring of 2016 and to use the session time available in October 2015 for the proposed colloquiums or expert group meetings on the topics to be considered by Working

Group IV. Consequently, a number of informal meetings might be required.

12. **Ms. Clift** (Secretariat) said that since Working Group V had only recently held its forty-seventh session, it would indeed be unrealistic to prepare documents in time for its next session if that session was held in October. Moreover, that Working Group was facing difficulties in finding a way forward with regard to one of the topics it was considering and a number of delegations were working on a proposal intended to resolve those difficulties, for which more time was needed.

13. **Mr. Maradiaga** (Honduras), expressing support for the proposal presented by the representative of the United States, said that Working Group III should hold its next session in December 2015, given the need to achieve concrete results within a reasonable period. During the intervening period, information and communications technologies could be used to exchange and circulate proposals and specific information in order to facilitate the Working Group's work.

14. **Mr. Zhang** (China), supported by **Mr. Leong** (Singapore), said that his delegation also supported the proposal presented. The Working Group should use its forthcoming session to work on a preliminary draft that built on the proposals already made by delegations, given that those proposals were the product of significant work. Depending on the progress of the discussions, it could then be decided how the Working Group should proceed at its subsequent sessions. The Working Group should be given an open mandate, and the text should be formulated solely on the basis of the work of the Working Group.

15. **Ms. Sabo** (Canada) said that it would be helpful if alternative dates in late November or early December could be found for the Working Group's session.

16. **Mr. Ngugi** (Kenya), welcoming the proposal presented by the United States representative, said that the Working Group should hold two sessions to cover the proposed work, in order to take full advantage of the proposed maximum period of one year for that work.

17. **Mr. Decker** (Observer for the European Union) said that his delegation joined others in supporting the proposal of the United States representative, including with regard to the suggested time limit of one year for the work to be undertaken, especially in view of the need for clarity with regard to the Working Group's mandate. In that regard, he welcomed the efforts made by delegations thus far to prepare compromise proposals in the interests of facilitating the Working Group's work and the achievement of consensus, and highlighted the importance of those proposals in guiding the Working Group's deliberations over the coming year. Since the Secretariat should be given sufficient time to prepare the documentation for the forthcoming session, his delegation supported the suggestion made by the representative of Canada that time should be allocated in early December rather than in October. However, his delegation could also accept the suggestion that only one session of Working Group III should be held during the coming year.

18. **Ms. Jamschon Mac Garry** (Argentina), welcoming the proposal made by the representative of the United States and seconding the view that the Working Group's mandate should be clearly defined, particularly in view of the time limit proposed, requested clarification with regard to the type of text envisaged as the product of the proposed work, such as recommendations, notes, model provisions or a practical guide.

19. **Mr. Kim** (United States of America) said that his delegation had envisioned a technical and explanatory document that would reflect the progress that had already been made on some of the more technical issues regarding online dispute resolution, such as independent neutrals and due process requirements.

20. **Mr. Schoefisch** (Germany) said that, in view of the difficulties that had been faced by the Working Group over the years, it was very useful to have a clear-cut mandate. His delegation therefore supported the proposal made by the representative of the United States. A time limit was essential given the protracted nature of the Working Group's discussions thus far, and it was important that the text to be prepared should be ready for consideration by the Commission at its forty-ninth session. If no result was reached, the work of the Working Group should come to an end.

21. His delegation also supported the suggestion that the Working Group should meet in late November or in December so that the Secretariat and delegations would have sufficient time to prepare, and agreed that, in order to avoid disrupting the work of Working Group V by using the dates reserved for that Group's session, alternative dates should be found.

22. **Ms. Chobisara** (Thailand) said that, while her delegation welcomed the proposal, the Working Group should have an open mandate with regard to the form of the text to be developed.

23. **Mr. Lee** (Republic of Korea) said that his delegation supported the proposal, but the forthcoming meeting of the Working Group should not adversely affect the work of the other working groups. The Working Group's mandate should be very precise in order to avoid an impasse similar to that previously encountered, and to ensure a tangible outcome.

24. **Ms. Laborte-Cuevas** (Philippines) expressed support for the views expressed in favour of an open mandate for the Working Group, so that all of the proposals made to date could be discussed.

25. **Ms. Strasser** (Austria) said that she agreed with the comments made by the representatives of the Republic of Korea and Germany.

26. **Mr. Bellenger** (France) said he concurred with previous speakers that the Commission would be unable to

produce a text within one or two sessions unless it was given a precise and detailed mandate.

27. **Mr. Mita** (Japan) said that his delegation joined others in supporting the proposal made by the United States representative.

28. **Mr. Leinonen** (Observer for Finland), **Ms. Laursen** (Denmark), **Ms. Bereczki** (Hungary) and **Mr. Matter** (Switzerland) expressed support for the proposal and for the view that the Working Group should be given a clear mandate in order to ensure that its discussions were focused.

29. **Mr. Wijnen** (Observer for the Netherlands) said that his delegation likewise supported the proposal and, while in favour of holding the next Working Group session in December, could also accept the suggestion of a single session during the coming year.

30. **Ms. Faber** (Observer for Luxembourg), joining previous speakers in supporting the proposal, said she agreed that the postponement of the session of Working Group III to the end of the year should not adversely affect the other working groups, particularly Working Group V, which should meet on the dates originally scheduled for its session.

31. **Ms. Malaguti** (Italy) expressed appreciation for the efforts made to reach agreement in the form of the United States delegation's proposal, which had her delegation's support and would facilitate the efficiency of the Commission's work in view of the many topics that it was to take up.

32. **Mr. Ahmed** (Observer for Egypt) said that his delegation also supported the proposal and considered that a clear mandate for the Working Group would ensure efficiency and adherence to the time limit that had been proposed. The session of Working Group III should be held at the end of the year, but that should not affect the work of other working groups.

33. **Mr. Chan** (Singapore) said that the importance of preparatory work for the coming session of the Working Group should be underscored. Given the tremendous burden that that work would place on the Secretariat, and in order to ensure that the discussions were as productive as possible and did not take longer than the two sessions allocated to the Working Group, it might be useful for all delegations that had views on the proposals made by the Secretariat in terms of the structure and content of the text to be developed to present those views for consideration well before the session. That would require the Secretariat's report on its preparatory work to be circulated in advance so that delegations had sufficient time to provide their comments, which would facilitate the discussions and save time. The limited duration of the Working Group's mandate must be borne in mind throughout the course of the work, and the discussions must be as efficient, focused and constructive as possible.

34. **The Chair** said he took it that the Commission wished to accept the proposed programme of work for Working Group III on the understanding that that work would take into account the various earlier proposals and would be subject to a time limit of one year, or no more than two Working Group sessions, and that the Secretariat would seek alternative dates for the Working Group's thirty-second session.

35. *It was so decided.*

Insolvency

36. **Ms. Clift** (Secretariat), drawing attention to paragraph 15 (c) of document A/CN.9/841, said that, since the Commission's previous session, the Secretariat had monitored developments in international work on the topic of financial contracts as requested, and had reported on those developments in document A/CN.9/851, paragraphs 1-5. Referring to paragraph 4 of that document, she noted that the World Bank's revision of Principle 10.4 of its Principles for Effective Creditor Rights and Insolvency Systems had been approved insofar as those principles related to the treatment of financial contracts in insolvency. Consequently, the World Bank principles and the recommendations of the UNCITRAL Legislative Guide on Insolvency Law (2004), which together formed the two elements of the unified standard on effective creditor rights and insolvency, were now inconsistent, which might lead to uncertainty for States that used the Guide as a tool for law reform. In view of the concern that the Guide no longer reflected best practice with respect to the treatment of financial contracts in insolvency, the Secretariat suggested, as outlined in paragraph 5 of document A/CN.9/851, that an informal study should be undertaken to examine the implications of the recent developments described for the relevant recommendations of the Guide, with a view to determining the extent to which those recommendations might need to be revised. On the basis of that study, the Secretariat would either submit draft revisions to Working Group V if those revisions were only minor or, if more work was required, submit a report to the Commission for consideration at its forty-ninth session.

37. **Ms. Maslen** (World Bank) expressed support for the Secretariat's proposal that the Working Group should consider current best practice in the treatment of financial contracts in insolvency and update the UNCITRAL Insolvency Law Guide accordingly. The Guide was an invaluable tool for the provision of technical assistance to developing member countries of the World Bank that requested the Bank's help in reforming legal and regulatory frameworks on business insolvency. An updated version of the Guide would ensure enhanced synergies and consistency with the World Bank's publications and ongoing work on insolvency.

38. **Ms. Vicandi Plaza** (Spain), referring to paragraphs 6-13 of document A/CN.9/851, said that the restructuring of sovereign debt should not be part of the future work of Working Group V. The Secretariat should therefore not be requested to monitor developments in international work in that area. Within the general framework of the United Nations, the International Monetary Fund (IMF) was the

agency responsible for the analysis and monitoring of mechanisms in relation to the restructuring of the sovereign debt of States. Moreover, through its resolution 67/247, the General Assembly had requested an ad hoc committee to analyse that subject within the framework of the United Nations Conference on Trade and Development (UNCTAD), and the Commission was already working on a large number of other subjects. Thus, rather than duplicating the work on the topic that was being carried out in other forums, the Commission should exchange information, procedures and experience relating to the subjects already on its agenda, and use its human and financial resources in an effective and balanced manner, establishing priorities and a strategic approach in order to make optimal use of those resources.

39. **Mr. Kim** (United States of America) said that his delegation did not support the proposal concerning work in the area of insolvency treatment of financial contracts, since Working Group V already had a full agenda, including high-priority and complex topics, and even after concluding its current work would need to consider the important question of what additional work was needed in order to address insolvency issues relating to micro-, small and medium-sized enterprises. The time available for the consideration of those important topics alone was insufficient. No study was needed in order to ascertain the amount of work required to review the relevant recommendations of the UNCITRAL Insolvency Law Guide and ensure consistency with current international best practice, since it was clearly likely that it would take the Working Group multiple sessions to address that topic. The development of the Principles on the Operation of Close-Out Netting Provisions, of the International Institute for the Unification of Private Law (Unidroit), had taken years of work involving difficult negotiations to reach a solution that was acceptable to all Unidroit member States. It was clear that addressing the topic in the Working Group would not be a simple exercise of ensuring the consistency of the UNCITRAL Insolvency Law Guide with the Unidroit Principles. Any discussion that sought to reopen issues already considered by Unidroit would inevitably be controversial, and, as was known, there was already disagreement on a number of the issues involved. His delegation was concerned that, as a result, work in that area would be neither fast nor easy, and would inevitably distract the Working Group from the subject areas to which its work was contributing something new and invaluable. All UNCITRAL instruments probably needed to be updated at some point after completion, but UNCITRAL resources should not be devoted to constantly reopening and revising past instruments, especially when another organization had already produced an up-to-date instrument in the same area.

40. **Mr. Marquez García** (Colombia) said that he agreed with the representative of Spain that the restructuring of sovereign debt should not be taken up by the Working Group, given that the subject had been dealt with by UNCTAD and such duplication should be avoided; moreover, it was a matter of international public law.

41. **Mr. Lapiere** (Observer for Belgium) said that the Commission should not request the Secretariat to monitor developments in international work relating to the elaboration of a sovereign debt restructuring mechanism. That issue should be discussed by organizations that had the appropriate expertise, namely IMF and the Paris Club, and duplication thus avoided.

42. **Ms. Clift** (Secretariat) said that the Secretariat did not intend to seek a mandate to carry out work on sovereign debt restructuring. During the discussions that had taken place in UNCTAD, reference had been made to UNCITRAL both with respect to insolvency law and international commercial arbitration. The Secretariat had therefore provided the information set out in document A/CN.9/851 simply in fulfilment of its role of reporting to the Commission on work undertaken by other organizations that might have implications for, or overlap with, the Commission's work. In that regard, she recalled that sovereign debt restructuring had also been discussed in the context of coordination and cooperation under item 14 of the current session agenda.

43. **Ms. Sabo** (Canada), welcoming the Secretariat's clarification, said that with regard to possible topics for the Working Group, she agreed with the representative of the United States there was no immediate need to pursue work relating to financial contracts. It was important to complete the work on multinational enterprise groups as, although that work was very challenging, the benefits of succeeding outweighed the difficulties that it presented. The Working Group should also complete its consideration of the other topics before it. Her delegation supported future work on the recognition and enforcement of insolvency-related judgments, which should also be a priority for the Working Group.

44. **Ms. Vicandi Plaza** (Spain), referring to paragraph 13 of document A/CN.9/851 in relation to sovereign debt restructuring, said that the Commission should not request the Secretariat to monitor issues that fell outside the Commission's purview, although her delegation had no objection to the Secretariat's maintaining contact with and attending meetings of other bodies if it considered such activities appropriate to and beneficial for its work.

45. **Mr. Kim** (United States of America) said that his delegation agreed that the Secretariat should not be burdened with a request to monitor yet another topic. Given the extent to which other organizations, particularly IMF, had been engaged in the issue of sovereign debt restructuring, and the fact that that issue essentially concerned international public law, the issue should not be considered as a possible area of future work or monitoring; instead, the Secretariat should focus on current projects.

46. **The Chair**, noting that there appeared to be consensus that the Secretariat should not monitor developments relating to sovereign debt restructuring, invited the Commission to return to its consideration of the

proposal to review the UNCITRAL Insolvency Law Guide with respect to the treatment of financial contracts.

47. **Mr. Estrella Faria** (Observer for the International Institute for the Unification of Private Law), responding to the comments made by the representative of the United States with regard to the Unidroit Principles on the Operation of Close-Out Netting Provisions, said that the topic of netting had been dealt with only in the course of implementation of the Institute's work on capital markets. The work on netting had been approved by the Unidroit General Assembly in 2010, after which three sessions of a study group had been convened, that group comprising representatives of academia, practising lawyers and representatives of domestic and international regulatory institutions and the financial sector, including IMF, the European Central Bank, the Bank for International Settlements and representatives of the Bank of France, the Bank of England and the United States Federal Reserve System. The first draft of the Principles had then been submitted to the Unidroit Governing Council, which had approved the convening of a committee of governmental experts. Nearly all 63 member States of Unidroit had sent delegates to participate in that work. Most delegations had been comprised of representatives of ministers of finance or central banks and other types of regulatory institutions. That work had resulted in the Principles on the Operation of Close-Out Netting Provisions, which had been approved by the Unidroit Governing Council in May 2013 and subsequently published. The Principles had already become the source of inspiration for domestic legislation on netting. If the Commission decided to update the UNCITRAL Insolvency Law Guide to reflect the Principles, Unidroit would be willing, in the spirit of cooperation, to participate in that work with a view to ensuring the full consistency and relevance of the work of the two organizations.

48. **The Chair** said he took it, in the light of the comments made, that the Working Group should focus on the topics on which it was already working and that it should not be requested to review the UNCITRAL Insolvency Law Guide in relation to the insolvency treatment of financial contracts.

49. *It was so agreed.*

Micro-, small and medium-sized enterprises

50. **Mr. Schoefisch** (Germany), recalling that the existing mandate of Working Group I had been confirmed by the Commission at its 1007th meeting, reaffirmed his delegation's support for that decision.

51. **Mr. Marquez García** (Colombia), noting the relevance of the Working Group's work on simplification of incorporation for developing countries, said that that work was of particular importance to Colombia, as it was his delegation that had proposed the mandate that had been given to the Working Group. Recalling that his delegation had also submitted to the Working Group, at its twenty-second session, a proposal for a model law on simplified corporations, which was set out in document A/CN.9/WG.I/WP.83, he requested the Commission to invite the Working Group to consider that document in the course of its discussion of simplification of incorporation, and proposed that the Working Group should develop a model law on the simplification of incorporation so that that text could be submitted to the Commission at its forty-ninth session.

52. **Mr. Kim** (United States of America) said that Working Group I was especially important to his delegation as micro-, small and medium-sized enterprises were the engines of economic growth and job creation around the globe, particularly in developing countries. His delegation was therefore pleased that the Commission had decided, in 2013, to ask a working group to work on the development of an enabling legal environment to facilitate the life cycle of micro-, small and medium-sized enterprises, beginning with the implementation of simplified rules of incorporation and operation of such enterprises. His delegation strongly supported the mandate of Working Group I and hoped that UNCITRAL would be able to pursue work on additional topics, such as business registration, financial inclusion, mobile payments, access to credit and alternative dispute resolution. Some of those topics would require coordination with other working groups, such as Working Group II and Working Group V.

53. The reports of Working Group I underscored the importance of establishing an enabling legal environment for micro and small enterprises in developing countries to effectively reach international markets through electronic and mobile commerce. As noted by the Secretariat at the Commission's forty-sixth session, when the Working Group had been given its current mandate, the creation of such an environment also contributed to reinforcing the rule of law at country level, which was conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable and equitable development. He welcomed the fact that the Working Group, at its twenty-fourth session, had taken up consideration of a draft model law on simplified business incorporation, as an initial priority. In that connection, his delegation supported the delegation of Colombia in seeking the conclusion of that work by 2016. The Working Group was poised to make excellent progress on simplified incorporation at its forthcoming session, and he hoped that the Working Group would be in a position to begin work on additional topics in the near future.

54. **Mr. Sorieul** (Secretary of the Commission), drawing attention to the distinction made in document A/CN.9/841 between current legislative activities, mandated future work and possible future work, said it was his understanding of the Commission's preliminary discussion that there were no proposals for future projects for Working Group I. While there had been mention earlier during the session of the possible extension of the Working Group's current mandate, its current work would in any case extend beyond the Commission's current session.

That continuation of its mandate should not, therefore, be considered as future activities.

55. **Ms. Gómez Ricaurte** (Ecuador) said it was not her understanding that the Commission had concluded its discussion of the activities of Working Group I. The mandate of the Working Group should be reaffirmed and priority should be given to the issue of simplified incorporation, with special focus on developing countries, before other topics were taken up.

56. **Mr. Marquez García** (Colombia), clarifying his earlier comments, said that his delegation also sought reaffirmation of the Working Group's current mandate, with particular emphasis on simplification of incorporation.

57. **Mr. Bellenger** (France) said that there was no need to reopen the previous week's discussion concerning the Working Group's current mandate, which, as the Secretariat had pointed out, should be distinguished from future activities. The Commission had already come to the clear conclusion, on the basis of that discussion, that the Working Group's mandate should be broad.

58. **Mr. Ngugi** (Kenya), said that, as he understood it, the purpose of revisiting the Working Group's current mandate under agenda item 18 was simply to confirm that mandate.

59. **Ms. Malaguti** (Italy), speaking as Chair of the Working Group at its twenty-third and twenty-fourth sessions, said that while the Working Group's mandate had indeed been reaffirmed earlier during the session, some delegations simply wished to clarify their positions with respect to that mandate. She welcomed the initiative of the delegation of Colombia to develop an instrument on simplified incorporation that could be widely applied, particularly given the many issues that the topic raised in relation to developing countries, and expressed appreciation for the delegation's efforts to garner the support of other Latin American countries for that project. The Working Group would work on that issue as much as possible, and there was a good chance that concrete results could be achieved very soon. Its mandate was sufficiently broad to allow, in addition, the discussion of specific topics.

60. **Ms. Sabo** (Canada), supported by **Mr. Lee** (Republic of Korea), said that her delegation opposed narrowing the Working Group's mandate, which had been confirmed the previous week as a broad mandate, to focus only on simplified incorporation.

61. **The Chair** said that the request by the representative of Colombia that the Working Group should consider document A/CN.9/WG.I/WP.83 with a view to the development of a model law on simplification of incorporation added a new element to the previous week's discussion of the Working Group's work. The implication of that proposal was not, however, that the documents already before the Working Group would no longer be considered. It was worth reiterating that the Working Group should focus on simplified incorporation and that the experience of developing countries should be taken into account.

62. **Mr. Petrovic** (Croatia) requested clarification as to whether the Commission was being asked to narrow the Working Group's mandate to focus exclusively on incorporation, which his delegation would oppose, or simply to confirm it. Given that document A/CN.9/WG.I/WP.83 had already been submitted to the Working Group and the Working Group was already focusing on simplified incorporation, the purpose of the current discussion was unclear.

63. **Ms. Polo Flórez** (Colombia) said that the desire of a number of delegations to reiterate the Working Group's mandate simply reflected the interest of developing countries in addressing issues affecting their economies. That mandate would allow the Working Group to consider specific issues without detriment to its original focus on simplification of incorporation. In that regard, she welcomed the constructive comments made by the Chair of the Working Group, which inspired confidence that the Working Group would make good progress and its discussions would yield a positive result.

64. **Mr. Schoefisch** (Germany) said that the Working Group's existing mandate had already been confirmed and, as he understood it, there was no further action for the Commission to take. As the Chair of the Working Group had indicated, the Working Group was free to discuss specific issues within that broad mandate.

65. **The Chair** said that the new element of the discussion was simply the request made by the representative of Colombia that document A/CN.9/WG.I/WP.83, and in particular the proposal it contained, should be taken into account.

66. **Ms. Sabo** (Canada) said that, although the proposal of the delegation of Colombia was useful, it did not constitute a new element of the discussion regarding the Working Group's work, as it continued to be considered by the Working Group and the Group's mandate remained unchanged. It was for the Working Group to decide what action to take with respect to the documents submitted to it.

67. **Mr. Kim** (United States of America) said that it was unnecessary to return to the discussion of the Working Group's current mandate. The Commission, at the current stage of its discussions, was required only to consider the possible future work of the Working Group, which was already adequately addressed in table 2 and subparagraph 15 (e) of document A/CN.9/841.

68. **The Chair** said he took it that the Commission wished to include document A/CN.9/WG.I/WP.83 among the documents under consideration by the Working Group under its current mandate as reaffirmed.

69. *It was so agreed.*

Security interests

70. **Ms. Nicholas** (Secretariat), drawing attention to paragraph 15 (h) of document A/CN.9/841, recalled that Working Group VI, in elaborating the draft model law on secured transactions, had considered the possible benefits of an accompanying guide to enactment that would set out the background to the model law and explanatory information for the benefit of enacting States. The Commission might wish to instruct the Working Group to undertake that work with a view to the submission of both the draft model law and the draft guide to enactment to the Commission for consideration and adoption at its forty-ninth session. Other possible future work in the field of security interests, including work on a contractual guide on secured transactions, particularly for micro-, small and medium-sized enterprises and enterprises in developing countries, and a uniform law text on intellectual property licensing, might be considered at a later stage. The Commission would be presented with more concrete proposals relating to those topics in the form of notes by the Secretariat, for further consideration.

The meeting was suspended at 4.10 p.m. and resumed at 4.25 p.m.

71. **Mr. Sorieul** (Secretary of the Commission), referring to the Commission's earlier discussion with regard to possible alternative dates for the next session of Working Group III, informed the Commission that the Conference Management Service had proposed the week of 2-6 November or the week of 23-27 November 2015.

Public procurement and infrastructure development

72. **Ms. Nicholas** (Secretariat), drawing attention to document A/CN.9/850, said that there were two topics that the Commission might wish to take into consideration in the area of procurement and infrastructure development, namely suspension and debarment in public procurement and public-private partnerships.

73. Referring to paragraphs 2-16 of document A/CN.9/850, she recalled that the UNCITRAL Model Law on Public Procurement, which had been adopted in 2011, contained only limited provisions on sanctions for non-compliance with the procedures it established. That had been the subject of some discussion among countries seeking to incorporate the Model Law into their national systems. While there was general agreement that procedures for suspension and debarment were extremely important in the implementation of a procurement system and in combating corruption, there was considerable variation in practice, as highlighted by the work carried out in the area by the World Bank, the Organization for Economic Cooperation and Development (OECD) and other organizations. Nevertheless, there was significant agreement on the key elements of the suspension and debarment procedure, such that work by the Commission could lead to a short, non-binding text that set out the procedures to be followed in cases of misconduct. The Secretariat had discussed that possibility with the World Bank, which had its own suspension and debarment area of operation, and it had been agreed that, should the Commission decide to undertake work in that area, the work would be carried out in close cooperation with the World Bank with a view to the joint endorsement of a set of standards, if possible. The Secretariat had also taken account of the requirements that would need to be fulfilled for the work to be taken up, including the requirements that duplication of the work of other bodies should be avoided and resources should be used judiciously.

74. Having considered all of those issues, the Secretariat suggested that the proposed work should not be undertaken by a working group because of its highly technical nature; instead, the Secretariat could explore the possible development of a non-binding text as described, in cooperation with the World Bank, other multilateral development banks and member States, in particular those which had been active in the implementation of the United Nations Convention against Corruption. It would then report back to the Commission so that appropriate action could be taken.

75. **Mr. Fruhmann** (Austria), supported by **Mr. Lee** (Republic of Korea), welcomed the Secretariat's proposal in light of the difficulties arising from suspension and debarment cases, at both the national and the international levels, and the significant differences between legal systems in that field. The topic merited further work by UNCITRAL.

76. **Mr. Kim** (United States of America) said that, although the topic was of great importance, he was uncertain whether it would be useful to develop a legislative text at the current stage. Recalling that the Commission had decided several years ago to discontinue active work on procurement topics, and given the amount of resources that had been dedicated to that topic in recent years, he doubted that more work in that area was currently justified. Nevertheless, his delegation was willing to consider the possibility of further preparatory work on the subject by the Secretariat, subject to the proviso that the main objective of that work should be to determine whether demand among States for a legislative instrument in that area was strong and whether they were likely to use such a text. Even if development banks and other organizations had an interest in the topic, it would only be worthwhile developing an instrument if States were inclined to adopt it.

77. **Ms. Sabo** (Canada), expressing support for the comments made by the representative of the United States, said that it would be preferable to describe the proposed work as exploratory rather than preparatory. A legislative text might not be appropriate given the differences between legal systems with respect to treatment of the topic.

78. **The Chair** said he took it, in the light of the comments made, that there was consensus that the Secretariat should carry out exploratory work as proposed and report to the Commission on that work at the Commission's forty-ninth session.

79. *It was so agreed.*

Public-private partnerships

80. **Ms. Nicholas** (Secretariat), referring to paragraphs 17-40 of document A/CN.9/850, said that many experts working in the field of public-private partnerships had suggested to the Secretariat that it would be helpful if the existing UNCITRAL texts on privately financed infrastructure projects were updated. During the two colloquiums that had been held to explore issues that might need to be taken into account if such a project were to be undertaken, it had become clear that very significant work might be needed. She recalled that the Commission had thus far declined to provide a mandate for significant future work in that area primarily because that work would require significant resources both of member States and the Secretariat and demand for that work appeared to be greater among experts and donor organizations than among member States. Consequently, the Secretariat had sought to reduce the scope for a significant project and, over the course of the past year, had undertaken a demand assessment, as part of which it had been in contact with a number of member States, largely developing countries, in order to assess their interest in a legal text as the outcome of such a project. While there was significant interest in having an up-to-date UNCITRAL text on public-private partnerships, there was considerably less interest in participating in the elaboration of such a text. Experts in that field had carried out a comprehensive review of the existing texts on privately financed infrastructure projects, and had provided UNCITRAL with detailed information on how each provision should be updated. They had also identified, to the extent possible, elements of those texts that currently only provided guidance but should be redrafted as model legislative provisions.

81. The Secretariat was confident that both the work needed and the impact on its resources would be limited given that so much had already been achieved. Therefore, with limited Secretariat involvement but significant and wide-ranging regional and national input, and the involvement of multilateral development banks and other experts in the field, an updated text on private-public partnerships containing model legislative provisions and a revised legislative guide explaining those provisions could probably be presented to the Commission for its consideration in 2016. The model provisions would not constitute a comprehensive model law, but could form the basis for a law in any State. It was important for the Commission to consider whether its review of the proposed provisions at its forty-ninth session would provide sufficient visibility and the opportunity to ensure that consensus on the provisions was reached.

82. **Mr. Bellenger** (France) said that his delegation supported the Secretariat's proposal and indeed had been in favour of the commencement of work on public-private partnerships in 2014 in view of the importance of that topic, particularly for developing countries. It also supported the organization of international colloquiums or similar events that would bring together a broad range of participants to discuss the issues concerned.

83. **Mr. Fruhmann** (Austria), likewise expressing support for the Secretariat's proposal, asked the Secretariat to clarify the type of mechanism that would be used to ensure that the proposed text was discussed as widely as possible before it was submitted to the Commission for consideration, given that there would be only limited time at the Commission's next session for member States to express their views.

84. **Mr. Kim** (United States of America) said that the conclusions drawn from the consultations held by the Secretariat with experts and representatives of States and organizations, as presented in document A/CN.9/850, indicated that the scope of the proposed work amounted to reviewing and redrafting a large amount of the existing texts on privately financed infrastructure projects. It was implausible that that work could be achieved in one year with limited Secretariat oversight and through colloquiums rather than a working group, as suggested in that document. The development of the original public-private partnership instruments and even the preparatory work carried out by the Secretariat on public–private partnerships to date had taken many years. He was concerned that the project could become a lengthy one and eventually involve a working group. While the topic was important and the Secretariat had done a great deal of exploratory work on it, he was not convinced that the work should move forward at the current stage or that further resources should be allocated for that purpose given the extensive work that would be needed and the fact that there might be work of higher priority to be done, although that possibility could be reviewed in the future. Moreover, the existing instruments on privately financed infrastructure projects were of high quality and were still very useful.

85. **Mr. Lee** (Republic of Korea) said that, while he understood the concerns expressed by the representative of the United States, the subject was very important, particularly for developing countries. He had observed at first hand that there was great demand in those countries for legislative guidance and information on public-private partnerships. He therefore endorsed the view that the Commission should continue to explore a way forward on that issue.

86. **Ms. Sabo** (Canada), expressing agreement with the comments made by the representative of the United States, said that her delegation had consistently voiced opposition to work on public-private partnerships in view of the huge variety of projects and interests involved and the fact that it was not an area that lent itself to harmonization in the manner proposed. Moreover, the Commission had just agreed to give the Secretariat a mandate to proceed with work on public procurement, which made it highly unlikely that an additional task, particularly one that was likely to involve a great deal more work than had been suggested, could be accommodated. Her delegation would be willing to consider the proposed mandate in 2016, once

the outcome of the work on public procurement was known and it was clear what resources were available.

87. **Ms. Nicholas** (Secretariat), responding to the question posed by the representative of Austria, said that, as suggested in document A/CN.9/850, inclusiveness and multilingualism would be ensured through colloquiums, to the extent that resources were available. In that regard, she noted that the two colloquiums already held on the topic had been well attended. The idea was to encourage experts on the topic, including those from member States, to participate to the extent possible.

88. **Mr. Sorieul** (Secretary of the Commission) said that, whether or not the Commission decided to request the Secretariat to work on public-private partnerships, the Secretariat would be extremely limited in terms of the work it could carry out before the Commission's next session. It could consider hosting colloquiums on the matter, but colloquiums held within the United Nations forum and in all six official languages of the Organization would require time and resources. The Commission had entrusted the Secretariat with a large amount of work and had decided to hold 12 sessions of the working groups over the course of the coming year, which meant that the amount of meeting time that could be requested of the Conference Management Service would also be limited. Moreover, the work would require considerable drafting and the circulation of a large number of documents among member States for comment, and meetings would then be needed to evaluate those comments. He therefore proposed that the Commission should keep the matter on its agenda and that the Secretariat should keep it abreast of further developments and be as prepared as possible should the topic be taken up.

89. *It was so agreed.*

The meeting rose at 5.05 p.m.

Summary record (partial) of the 1014th meeting
Held at the Vienna International Centre, Vienna, on Friday, 10 July 2015, at 9 a.m.

[A/CN.9/SR.10014]

Chair: Mr. Reyes Villamizar (Colombia)

The meeting was called to order at 9.40 a.m.

Work programme of the Commission (*continued*) (A/CN.9/841 and 850)

1. **The Chair** invited the Commission to consider section IV of document A/CN.9/841 concerning the allocation of resources.

2. **Ms. Nicholas** (Secretariat) said it was her understanding that conference time for the working groups for the following year had already been allocated and there were therefore no outstanding questions in relation to the resources available in respect of legislative development for that year.

3. It was also her understanding that the Commission had decided that the Secretariat should continue to provide the various support activities considered earlier in the session, to the extent that its resources allowed.

4. Drawing attention to paragraphs 27-33 of document A/CN.9/841, she recalled that prior to the congresses held to commemorate the twenty-fifth and fortieth anniversaries of UNCITRAL, the Secretariat had been requested to submit proposals for the consideration of the Commission in respect of how each congress should be organized. She further recalled that the issues covered at those congresses had spanned a wide range of topics and had included consideration of both the current and future work programmes of the Commission. In that regard, she drew attention to the suggestion, set out in paragraph 33 of document A/CN.9/841, that the Commission should hold a third congress on the occasion of its fiftieth session in 2017 and that, if such a congress was to be held, the Commission should instruct the Secretariat on the possible scope and scale of the congress and matters relating thereto. On that basis, the Secretariat would then submit its proposals to the Commission at its forty-ninth session.

5. **Ms. Sabo** (Canada) expressed support for the organization of a third UNCITRAL congress as proposed, especially since the congresses held in 1992 and 2007 had been highly successful and had resulted in a number of proposals regarding possible areas of work.

6. **Mr. Chan** (Singapore), expressing agreement with the representative of Canada, said that his delegation looked forward to receiving the proposals of the Secretariat with regard to the congress. The fiftieth anniversary of UNCITRAL should be celebrated in a manner befitting such a milestone and in such a way as to increase public awareness of the Commission's work to date.

7. **The Chair** said he took it that the Commission wished to accept the suggestion set out in paragraph 33 of document A/CN.9/841.

8. *It was so decided.*

The part of the meeting from 9.50 a.m. to 10.40 a.m. was not covered in the summary record.

Adoption of the report of the Commission (*continued*) (A/CN.9/XLVIII/CRP.1 and Add.4)

9. **Mr. Petrovic** (Croatia), Rapporteur, recalling that the Commission had already adopted the parts of the draft report contained in documents A/CN.9/XLVIII/CRP.1/Add.1-3 at its 1006th and 1007th meetings, drew attention to documents A/CN.9/XLVIII/CRP.1 and A/CN.9/XLVIII/CRP.1/Add.4.

A/CN.9/XLVIII/CRP.1

10. *Document A/CN.9/XLVIII/CRP.1 was adopted*.

A/CN.9/XLVIII/CRP.1/Add.4

11. **Mr. Kim** (United States of America) proposed that the words "a revised version of the Notes could be considered by Working Group II" in paragraph 1 of the document should be replaced with the words "the Secretariat could seek input from Working Group II on specific issues", for the sake of clarity. He also proposed that the words "during its sixty-fourth session" in the same paragraph should be replaced with the words "during one or two days of its sixty-fourth session." Those changes would more accurately reflect the discussions that had taken place the previous week.

12. **Ms. Sabo** (Canada) said that the first proposed change was not necessary, given that there were many issues with regard to which no conclusions had been reached.

13. **Mr. Kim** (United States) said that the change would clarify the nature of the review carried out by Working Group II. The proposed reference to one or two days of the Working Group's session, on the other hand, was perhaps unnecessary.

14. **The Chair** said he took it that the Commission wished to accept the first proposal made by the representative of the United States.

15. *It was so decided.*

16. **Mr. Leong** (Singapore) suggested that the heading of subsection B 1 should be brought into line with the title of agenda sub-item 4 (b) in order to avoid confusion.

17. *It was so decided*.

18. **Ms. Jamschon Mac Garry** (Argentina), referring to the second sentence of paragraph 13, proposed the deletion

of the words “negotiating investment agreements” after the word “States”. With regard to the third sentence of that paragraph, she proposed the insertion of the word “wide” before the word “support” and the insertion of the words “at this stage” after the word “premature”.

19. **Mr. Schoefisch** (Germany), supported by **Mr. Kim** (United States) and **Mr. Leong** (Singapore), said that the word “some” would be more appropriate than the word “wide”, since most delegations had been of the view that work on the topic of concurrent proceedings should be carried out at a later stage, despite the importance of that topic. Moreover, the word “widely” was already used later in the sentence. The original wording of the sentence should therefore be retained.

20. **The Chair** said he took it that the Commission wished to accept the proposal to insert the words “at this stage” after the word “premature” in the third sentence of paragraph 13.

21. *It was so decided*.

22. **Mr. Kim** (United States) proposed the insertion of the words “, consistent with the Commission’s request in 2014,” after the words “It was also suggested that” in the second sentence of paragraph 14. He also proposed the insertion of the word “including” after the word “experts” in paragraph 15, and the insertion of the words “counsel for the” before the word “parties” in the third sentence of paragraph 18.

23. *It was so decided*.

24. *Document A/CN.9/XLVIII/CRP.1.Add.4, as orally amended, was adopted*.

The discussion covered in the summary record ended at 11.05 a.m.

Summary record (partial) of the 1015th meeting
Held at the Vienna International Centre, Vienna, on Friday, 10 July 2015, at 2 p.m.

[A/CN.9/SR.10015]

Chair: Mr. Reyes Villamizar (Colombia)

The discussion covered in the summary record began at 4.05 p.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/XLVIII/CRP.1/Add.17)

A/CN.9/XLVIII/CRP.1/Add.17

1. **The Chair** invited the Commission to consider document A/CN.9/XLVIII/CRP.1/Add.17, which contained the section of the draft report relating to the Commission's deliberations on its work programme under item 18 of the agenda.

2. **Mr. Lapiere** (Observer for Belgium) suggested deleting the unnecessary words "such as cybersecurity" from the end of the second subparagraph of subparagraph 4 (b) and inserting a new fourth sentence to read along the lines of "In order to define the methodology of work, those member States that initiated this proposal expressed their availability to support the Secretariat, specifically by organizing a colloquium on this issue."

3. **Mr. Bellenger** (France) suggested replacing the words "subject to the conclusion of the current work" in the final subparagraph of subparagraph 4 (b) with "following the current work", which was less restrictive. He also suggested the addition of a new sentence reading "If the current work of the Working Group concluded prior to the next session of the Commission, the Working Group could take up the subjects mentioned above" at the end of that final subparagraph.

4. **The Chair** said he took it that the Commission wished to accept the suggestions of the representatives of Belgium and France.

5. *It was so decided*.

6. **Mr. Schoefisch** (Germany), referring to the first subparagraph of subparagraph 4 (d), suggested replacing the words in parentheses, "(which envisaged a single Track of Rules)", with the words "(which envisaged a single set of rules)", because if reference was made to a "single track", readers might erroneously conclude that only one track remained of the two-track solution that the Commission had discussed.

7. **The Chair** took it that the Commission wished to accept that suggestion.

8. *It was so agreed*.

9. **Mr. Zhang** (China), referring to the first sentence of the penultimate subparagraph of subparagraph 4 (d), suggested inserting the text ", on the basis of further discussion on the third proposal and other proposals," between the words "that is, the Working Group should" and the words "seek to develop a non-binding descriptive text".

10. **Mr. Schoefisch** (Germany) said that his delegation would prefer that subparagraph to be brought into line with what had been agreed upon by the Commission at its 1013th meeting. Accordingly, the first sentence should end with the words "should be a precise one" and the remainder of the original sentence should be replaced with a new second sentence reading "The Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration)."

11. **The Chair** asked the representative of Germany whether it might be possible to merge the proposed sentence with the language suggested by the representative of China.

12. **Mr. Schoefisch** (Germany) said that given that the sentence that he had proposed reproduced the exact wording of the proposal agreed on by the Commission at its 1013th meeting, it would be preferable to use that wording.

13. **Mr. Zhang** (China) said that complete consensus with regard to the mandate of Working Group III had not been reached during the discussion at that meeting. His delegation and others had expressed the hope that that mandate would be broad, and he wished that to be reflected in document A/CN.9/XLVIII/CRP.1/Add.17. The delegations in question had already expressed support for his proposal in informal consultations.

14. **The Chair** said that, while he agreed that unanimity had not been reached, the Commission had decided — after a lengthy debate — on a fairly restrictive mandate as described in the language that had just been read out by the representative of Germany. In order for the report to reflect the comments made by the representative of China, language could be added to the effect that certain delegations had disagreed with the proposal that had eventually been accepted and had expressed a wish for the Working Group to continue its work on the basis of a broader mandate.

15. **Mr. Wijnen** (Observer for the Netherlands) said that the sentence proposed by the representative of Germany accurately reflected the discussion and conclusion of the Commission at its 1013th meeting. The vast majority of delegations had supported the language that had been read out at that meeting and it was important that the report should reflect that fact.

16. **Mr. Decker** (Observer for the European Union) pointed out that the beginning of subparagraph 4 (d) set out a lengthy description of the discussion that had taken place at the Commission's 1013th meeting, with all views represented. Since the penultimate subparagraph of subparagraph 4 (d) was the conclusion of that section of the addendum, it should reflect only what had actually been concluded, which the text proposed by the representative of Germany accurately captured. Meanwhile, the first sentence of the fifth subparagraph of subparagraph 4 (d) appeared to contain the information that the delegation of China wished to see reflected, namely that that delegation and others had been in favour of a broader mandate.

17. **The Chair** suggested that the fifth subparagraph of subparagraph 4 (d) should be expanded if that was felt to be appropriate.

18. **Ms. Nicholas** (Secretariat) drew attention to the fact that the final two sentences of the antepenultimate subparagraph of subparagraph 4 (d), beginning with the words "On the other hand" and ending with the words "it was proposed that the Working Group be given an open mandate", also appeared to reflect the position that had been expressed by the delegation of China and others at the 1013th meeting.

19. **Mr. Zhang** (China) said that his suggestion was intended not to change the nature of the mandate that had been decided on by the Commission but to achieve continuity and clarify the future working method of the Working Group.

20. **Ms. Nicholas** (Secretariat) asked the representative of China whether it would help if the words "it was decided that the mandate for the Working Group should be a precise one" were removed from the penultimate subparagraph of subparagraph 4 (d), and the remainder of that sentence modified on the basis of the proposal by the representative of Germany, so that the full sentence read "After discussion, and while appreciating the significant work that had been devoted on the earlier proposals, the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration)."

21. **Mr. Zhang** (China) said that while that suggestion was acceptable, it did not take into account the text that he had proposed.

22. **Ms. Nicholas** (Secretariat) suggested that, in the antepenultimate subparagraph of subparagraph 4 (d), the word "suggested" in the phrase "On the other hand, it was suggested that the progress on the existing compromise proposals should not be ignored" should be replaced with the word "agreed" to make clear, when that subparagraph was read in conjunction with the penultimate subparagraph, that the reference to the elements on which the Working Group had previously reached consensus included all compromise proposals previously before the Working Group. In other words, those elements, including the third proposal, were the ones that would be used to elaborate the non-binding descriptive document referred to.

23. **Mr. Zhang** (China) said that his delegation was willing to accept the language proposed by the Secretariat.

24. **Mr. Schoefisch** (Germany) said that his delegation was also willing to accept the Secretariat's suggestion, which represented a good solution.

25. **Ms. Nicholas** (Secretariat) said that if the reference to "a precise mandate" was removed, it would also make sense to remove the final sentence of the antepenultimate subparagraph of subparagraph 4 (d), which referred to an open mandate. Thus, the need to characterize the mandate as open or precise would be avoided.

26. **Mr. Decker** (Observer for the European Union) wondered whether the suggested wording "On the other hand, it was agreed" in the penultimate sentence of that subparagraph would conflict with the phrase "the Working Group should consider all the existing proposals before deciding how best to proceed" and with the conclusion set out in the following subparagraph.

27. **Ms. Nicholas** (Secretariat) said that if the Commission were to accept the proposed changes, the final sentence of the antepenultimate subparagraph of subparagraph 4 (d) would read: "On the other hand, it was agreed that the progress on the existing compromise proposals should not be ignored, and the Working Group should consider all the existing proposals before deciding how best to proceed." The penultimate subparagraph would then begin: "After discussion, and while appreciating the significant work that had been devoted to the earlier proposals, the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration)." Responding to the comment made by the representative of the European Union, she said that the subparagraphs might need to be restructured to address that concern.

28. **Mr. Barbuk** (Belarus) expressed support for the language proposed by the representative of the Secretariat.

29. **Mr. Schoefisch** (Germany) said that his delegation could accept the proposed wording on the understanding that the instructions given to the Working Group, reflected in the penultimate subparagraph of subparagraph 4 (d) as a precise mandate, would not be interpreted as being modified by the reference to agreement in the preceding subparagraph, which had originally described the evolution of the discussion rather than a conclusion.

30. **Mr. Kim** (United States of America) said he concurred that using the word "agreed" rather than the word "suggested" was misleading. The current wording of that sentence should either remain unchanged, or the word

"suggested" could be replaced with "stated". Furthermore, the suggested wording "the Commission instructed Working Group III to continue its work" in the penultimate subparagraph was also misleading, because the Commission had established a new and precise mandate.

31. **Mr. Decker** (Observer for the European Union) suggested that as a compromise solution, and in order to clarify that the third proposal referred to in the addendum was among the elements that would be used to elaborate the non-binding descriptive document to be developed, as clarified by the Secretariat, the sentence beginning "On the other hand" should read: "On the other hand, it was suggested that the progress on the existing compromise proposals, in particular on the third proposal, should not be ignored". The penultimate subparagraph could then be modified as proposed by the Secretariat.

32.

33. **The Chair** said that owing to time constraints and the fact that no agreement had been reached, the discussion of the addendum would continue at the 1016th meeting.

The meeting rose at 5.05 p.m.

Summary record of the first part (public) of the 1016th meeting
Held at the Vienna International Centre, Vienna, on Monday, 13 July 2015, at 9.30 a.m.

[A/CN.9/SR.10016]

Chair: Mr. Lee (Vice-Chair) (Republic of Korea)

The meeting was called to order at 9.40 a.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/XLVIII/CRP.1/Add.17)

A/CN.9/XLVIII/CRP.1/Add.17 (continued)

1. **Ms. Nicholas** (Secretariat) said that during informal consultations, a number of delegations had agreed on various changes to the text of the antepenultimate and penultimate subparagraphs of subparagraph 4 (d) of the addendum. With regard to the antepenultimate paragraph, beginning with the words "In addition", delegations had pointed out that the word "that" was missing between the words "proposals" and "had", and had proposed the insertion, following the word "recalled", of a footnote referring to the proposals concerned, namely those set out in document A/CN.9/WG.III/WP.121 and in paragraphs 142 et seq. of document A/CN.9/833. It had also been suggested that the final two sentences of the subparagraph should be replaced with the words "Recognizing the significant work that had been devoted to the earlier proposals, it was suggested that the Working Group be given an open mandate."

2. With regard to the penultimate subparagraph, it had been proposed that the first two sentences should be replaced with the following text: "It was agreed that any future text should build upon the progress on the third proposal and other proposals. The Commission instructed Working Group III to continue its work towards elaborating a non-binding, descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration)." The paragraph would then continue as originally drafted, with the sentence beginning "It was also agreed that".

3. **Mr. Schoefisch** (Germany) and **Mr. Dennis** (United States of America) expressed support for the proposed text.

4. **Ms. Polo Flórez** (Colombia) also expressed support for the proposed text. As a separate matter, she asked the Secretariat to correct the Spanish translation of the term "public policy issues" in the seventh subparagraph of subparagraph (d) of the Spanish language version of the document.

5. **Ms. Nicholas** (Secretariat) said that it had been suggested during the informal consultations that the words "public policy" should be replaced with the word "those", which would resolve the matter in the Spanish language version of the document.

6. **Ms. Polo Flórez** (Colombia) asked the Secretariat to ensure that the translations of the document accurately expressed the intentions of the English language version.

7. **Mr. Maradiaga** (Honduras) expressed support for the comments of the representative of Colombia and for the compromise proposal.

8. **Mr. Decker** (Observer for the European Union) welcomed the proposals presented by the Secretariat, which appropriately reflected the Commission's discussions. He agreed with the previous speakers that the accuracy of the translations of the document should be ensured.

9. **The Chair** said he took it that the Commission wished to approve subparagraph 4 (d) of document A/CN.9/XLVIII/CRP.1/Add.17 as orally amended.

10. *It was so decided*.

11. **Mr. Dennis** (United States of America) requested the addition of a short paragraph to reflect the debate that had taken place in respect of micro-, small and medium-sized enterprises as part of the Commission's discussion, at its 1013th meeting, of its current and future work. The paragraph had been drafted in consultation with the Chair of Working Group I to ensure that it accurately reflected the decision taken with respect to the work of that Working Group, and would read "With respect to work on micro-, small and medium-sized enterprises, support was expressed for future work described in table 2, paragraph 13, of document A/CN.9/841. The Commission confirmed the specific elements of the mandate discussed as part of the report of Working Group I under agenda item 6, and the need to prioritize work on simplified incorporation, taking into account the needs of developing countries. It was further agreed that the work should take into account international best practices, including those reflected in document A/CN.9/WG.I/WP.83."

12. **Ms. Sabo** (Canada) said that that proposal did not appear to reflect the Commission's discussions in a balanced or accurate manner.

13. **Mr. Bellenger** (France), expressing agreement with the representative of Canada, said that his delegation would need more time to consider the proposal, although he doubted that it was necessary or appropriate to insert a paragraph relating to micro-, small- and medium-sized enterprises in document A/CN.9/XLVIII/CRP.1/Add.17 given that the document covered other topics.

14. **Mr. Maradiaga** (Honduras) expressed support for the proposal of the United States delegation, which was appropriate in respect of developing countries such as his own. He did not see the proposal as controversial; it simply addressed the need to focus the efforts of the Working Group on a mechanism that would provide practical and expeditious assistance to micro-, small and medium-sized enterprises.

15. **Mr. Schoefisch** (Germany) recalled that during the Commission's discussions on the work of Working Group I, a number of States had proposed that the Working Group should shift the focus of that work to other topics. It had been difficult to reach a conclusion, and it was not clear to his delegation what the outcome of those discussions had been or whether that outcome was accurately reflected in the proposal by the United States representative. He therefore suggested that interested delegations should discuss the matter further and come up with wording that was in line with the conclusions reached.

16. **Ms. Polo Flórez** (Colombia) said that document A/CN.9/XLVIII/CRP.1/Add.17 should reflect the discussion that had taken place concerning the work of Working Group I. While she supported the proposal of the United States delegation, she was open to discussing the final content of the proposed additional paragraph with interested delegations.

17. **Mr. Mirza** (Pakistan) expressed support for the proposal made by the United States delegation.

18. **Ms. Laborte-Cuevas** (Philippines) requested clarification from the United States representative with regard to where he wished the proposed paragraph to be inserted.

19. **Mr. Dennis** (United States of America) said that the paragraph should be inserted in the text in the order in which it had been discussed during the Commission's deliberations. With regard to the question of whether the proposed language accurately reflected what had been discussed during those deliberations, he said that, like the delegation of Germany, his delegation had understood the Chair of the Commission to have concluded that work on simplified incorporation should be prioritized, in line with the statement that had been made by the Chair of Working Group I. That did not mean that other work should not be carried out. That key message should be reflected in the report of the session. He reiterated that the language of the proposed paragraph had been verified by the Chair of the Working Group.

20. **Ms. Sabo** (Canada) said that that was not her recollection of the Commission's discussion. That discussion had not been on the future work set out in table 2, paragraph 13, of document A/CN.9/841, but rather on the two divergent positions that had emerged among the delegations, the first position being that Working Group I should prioritize work on simplified incorporation and the second being that, since document A/CN.9/WG.I/WP.83 was only one of a number of documents being considered by Working Group I, simplified incorporation was only one of a number of topics that the Working Group should cover. While the mandate of the Working Group had been confirmed, the Chair had not concluded that simplified incorporation should take priority, because it had not been possible to reach consensus. Therefore, the proposed statement that "support was expressed for future work described in table 2, paragraph 13, of document A/CN.9/841" was incorrect. That could be verified by checking the audio recording of the meeting. There had been agreement only that Working Group I should continue to consider document A/CN.9/WG.I/WP.83. She was also hesitant to agree with the final sentence of the proposed text, which suggested that the entire working paper reflected international best practices. As a compromise solution, and in light of the two divergent views on the matter, she suggested the addition of a shorter, more factual statement along the following lines: "With regard to the Working Group on micro-, small- and medium-sized enterprises, some States were strongly of the view that the Working Group should focus on simplified incorporation, taking into account document A/CN.9/WG.I/WP.83. Other States were of the view that document A/CN.9/WG.I/WP.83 was already under consideration along with other approaches, and the Commission confirmed the mandate of the Working Group."

21. **Mr. Sorieul** (Secretary of the Commission) asked the Commission to ensure clarity in order to prevent the same discussion from taking place at the twenty-fifth session of Working Group I. The Commission should inform the Working Group if there was strong disagreement as to how it should proceed, and suggest how that disagreement might be resolved. However, it was his understanding that the Commission had expressed its satisfaction with the work being undertaken by the Working Group, which was in line with its original mandate to address the needs of developing countries, particularly with regard to micro-enterprises. Nevertheless, simply confirming the mandate would not resolve the fact that there were two different interpretations of that mandate.

22. **Mr. Ngugi** (Kenya) expressed agreement with the representative of Colombia that the discussion of micro-, small and medium-sized enterprises and the future work of Working Group I should be reflected in the report. The Commission should seek a compromise solution to resolve the disagreement on the matter.

23. **Mr. Bellenger** (France) said that it was unnecessary to return to the discussion of the Working Group's work or to include a summary of that discussion in document A/CN.9/XLVIII/CRP.1/Add.17 given that that discussion was already reflected, and all delegations' views expressed, in document A/CN.9/XLVIII/CRP.1/Add.17 as adopted at the Commission's 1015th meeting.

24. **Mr. Cervera Martínez** (Mexico) said that his delegation had no objection to the proposal made by the United States delegation. He agreed that it was important to reflect accurately in the report the discussions that had taken place in order to provide the Working Group with guidance in respect of its continuing work. In the light of the objections of certain delegations, the precise language of the proposed paragraph could be worked on.

25. **Mr. Lamolliatte** (Observer for Chile), expressing support for those comments, said that the text proposed by the United States representative accurately reflected the

Commission's discussion. He also agreed that it was important to provide Working Group I with guidance in terms of the direction its work should take.

26. **Mr. Dennis** (United States of America) said that his delegation would like the text that he had proposed to be included in the report, but was willing to seek a compromise with regard to the precise wording of that text in informal consultations. At the very least, the fact that the future work suggested in table 2, paragraph 13, of document A/CN.9/841 had been discussed, as the audio recording of the meeting would confirm, should be reflected

27. **Mr. Sorieul** (Secretary of the Commission) said that, as had already been pointed out, the matter under discussion related to the manner in which the current mandate of the Working Group was interpreted rather than to future work; accordingly, it should be addressed in document A/CN.9/XLVIII/CRP.1/Add.5 rather than document A/CN.9/XLVIII/CRP.1/Add.17, which concerned future work. In other words, if it was felt that the conclusion recorded in document A/CN.9/XLVIII/CRP.1/Add.5 with respect to the Working Group's current mandate was now to be changed, that change should be reflected in that addendum. The question of whether additional text was required in document A/CN.9/XLVIII/CRP.1/Add.17 to reflect discussion of the suggestions for future work of Working Group I as proposed in document A/CN.9/841 was a separate matter. Given that current and future work had been carefully distinguished in the documentation prepared by the Secretariat, the two issues should be kept separate.

28. **Mr. Dennis** (United States of America) recalled that when the agenda of the current session of the Commission had been approved, the Chair had specifically stated that no final decisions would be taken with respect to the work of the working groups under items 6 to 9 until the Commission had discussed its work programme under item 18. It was his understanding that the discussion of micro-, small and medium-sized enterprises under agenda item 6 had been a preliminary one and that that discussion had been concluded under agenda item 18. When document A/CN.9/XLVIII/CRP.1/Add.5 had been approved, his delegation had made no objection to the summary of the Commission's discussion as set out in that document. Document A/CN.9/XLVIII/CRP.1/Add.17 summarized the discussion of online dispute resolution under both item 7 and item 18 of the Commission's agenda, including the final decision adopted in respect of how current work on that topic would proceed. The discussion on Working Group I should likewise be reflected in that addendum. Indeed, the majority of delegations that had spoken at the current meeting had expressed support for the insertion of the text that he had proposed.

29. **Ms. Polo Flórez** (Colombia) said that she shared the understanding of the United States representative that the Commission had agreed to postpone any decisions with respect to the working groups under agenda items 6 to 9 until future work had been considered.

30. **Ms. Sabo** (Canada) said that it was important to find a way to move forward on the issue. It was clear from the discussion of document A/CN.9/XLVIII/CRP.1/Add.17 that there was no common understanding with regard to the process and purpose of the discussion on future work. That discussion had related only to working groups that had finished a project and were available to begin future work, and Working Group I was not among those groups. It was not appropriate to discuss a substantive issue at the stage of adopting the Commission's report. In the interests of moving forward, if the United States delegation had indeed made a statement relating to the future work set out in table 2, paragraph 13, of document A/CN.9/841, a sentence should be inserted at an appropriate point in document A/CN.9/XLVIII/CRP.1/Add.17 to the effect that support had been expressed for that work. However, her delegation could not accept the remainder of the text proposed by the United States representative, as the question of the mandate of Working Group I should be reflected only in A/CN.9/XLVIII/CRP.1/Add.5.

31. **Mr. Sorieul** (Secretary of the Commission) pointed out that the final paragraph of document A/CN.9/XLVIII/CRP.1/Add.5 already referred to the mandate of Working Group I. If the proposal by the United States representative were accepted, that mandate would be repeated in document A/CN.9/XLVIII/CRP.1/Add.17. By stating in one part of the report that the Working Group's mandate was being renewed and in another that the priorities of its work were being revised, the Working Group was not being given clear guidance. Therefore, the Commission should clarify the issue.

32. **Mr. Dennis** (United States of America) said that the second sentence of his delegation's proposal should resolve any concerns in that regard. Given that the report would specifically refer back to the decision to reaffirm the Working Group's mandate, it would be very clear. It was also important to highlight that at the Commission's 1013th meeting, the Chair of Working Group I had specifically stated, as reflected in his delegation's proposal, that simplified incorporation should be the priority of Working Group I. While some delegations had indeed questioned the need to continue discussion of the matter in the context of the Commission's work programme, others had supported its continued discussion.

33. **Mr. Schoefisch** (Germany) said that the outcome of the discussion on the future work of Working Group I remained unclear. His delegation's impression had been that there had been support for a shift in the focus of the Working Group's work. He therefore suggested checking the audio recording of the meeting in question to clarify the matter, and basing the final text of document A/CN.9/XLVIII/CRP.1/Add.17 on that audio recording.

34. **The Chair** suggested that, in view of the fact that there appeared to be no solution to the current disagreement, the matter should be resolved at a later stage, possibly during informal consultations, and that the Commission should return to its consideration of document A/CN.9/XLVIII/CRP.1/Add.17 at the time of adoption of

the remaining parts of its report, when it would be able to consider any compromise suggestions that had been made.

35. *It was so agreed*.

36. **Ms. Nicholas** (Secretariat) recalled that several final issues had been noted at the previous meeting in respect of the work programme of the Commission for the following year. Accordingly, it was suggested that four paragraphs should be added to document A/CN.9/XLVIII/CRP.1/Add.17, in relation to the Commission's legislative activities, support activities and the possibility of commemorating the fiftieth anniversary of UNCITRAL through a congress. Those proposed paragraphs would be submitted in document A/CN.9/XLVIII/CRP.1/Add.19 for the Commission's consideration.

37. **The Chair** said he took it that, on that understanding, the Commission wished to provisionally adopt document A/CN.9/XLVIII/CRP.1/Add.17.

38. *It was so decided*.

The public part of the meeting rose at 11.05 a.m.

Summary record of the 1017th meeting (closed)
Held at the Vienna International Centre, Vienna, on Monday, 13 July 2015, at 2 p.m.

[A/CN.9/SR.10017]

Chair: Mr. Labardini Flores (Chair of the Committee of the Whole) (Mexico)

The meeting was called to order at 2 p.m.

Consideration of issues in the area of security interests (*continued*)

(a) Consideration and provisional approval of parts of a model law on secured transactions (A/CN.9/830, A/CN.9/836, A/CN.9/852 and A/CN.9/853; A/CN.9/XLVIII/CRP.3) (*continued*)

1. The Chair invited the Committee to resume its consideration of the articles of the draft Registry Act contained in document A/CN.9/852.

Section A. General provisions (articles 1-3) (continued)

2. **Mr. Lee** (Republic of South Korea) expressed support for the reformulation of article 1 of the draft Registry Act as proposed at the previous meeting.

3. The Chair recalled that the various proposals made at that meeting included the addition of a new provision at the beginning of the Registry Act — possibly in square brackets to indicate that the Registry Act could be adopted as a stand-alone text - to explain the purpose of the text and its relationship to the Model Law. It had also been proposed that the text of article 26, paragraph 2, of the draft Model Law be incorporated in the new provision, to the effect that any person could submit a notice to the Registry; that draft article 3 be moved up to follow the introductory text; and that the word "rights" in the heading of article 1 be replaced with the word "agreements". Furthermore, there appeared to be agreement that article 1 should be revised to clarify that a notice might relate to security rights created under multiple security agreements between the parties identified in the registered notice.

4. He took it that, subject to that latter change, the Committee wished to approve the substance of article 1 and to request the Secretariat to redraft the opening part of the Registry Act in the light of the various proposals made.

5. *It was so decided*.

6. *The substance of article 1, subject to the agreed amendment, was approved*.

7. **Mr. Cohen** (United States of America), drawing attention to article 2, proposed that the words "An initial or amendment notice" should be replaced with the words "A notice" and that the words "before or after" be inserted before the words "the conclusion of the security agreement."

8. Referring to the second sentence of the note to the Commission under article 3, he said that subparagraph 2 (b) was unnecessary and should be deleted, since if authorization by the initial grantor was required for the registration of an amendment notice that added a new grantor, that would give the initial grantor the unusual power to prevent the addition of the new grantor.

9. **Ms. Walsh** (Canada) expressed support for the proposed drafting changes with respect to article 2 and, with regard to article 3, said she agreed that paragraph 3 of the article was sufficient and subparagraph (b) of article 2 should be deleted, since the grantor identified in the initial notice should not be able to prevent the addition of the new grantor through a requirement for authorization.

10. The wording of subparagraph 2 (a) of article 3 should be clarified as referring to situations in which the grantor authorized the registration of assets either through the security agreement or through a separate authorization and no additional assets were added for which an amendment notice was registered.

11. While she agreed with the policy underlying paragraphs 3 and 4 of the article, paragraph 3 did not apply to cases in which there was no new grantor but rather a change of the name of the original grantor, a situation that was provided for in article 24. The Guide to Enactment could therefore clarify that the addition of a grantor did not necessarily mean the addition of a new grantor, even though the new name of an original grantor would be entered in the amendment notice.

12. **Mr. Sono** (Japan), referring to article 2, asked whether the intended consequence of the proposal made by the United States delegation to replace the words "An initial or amendment notice" with the words "A notice" was that the provision would apply to any notice, including cancellation notices. If that was not the case, it would be preferable to retain the original wording.

13. His delegation supported the proposal to delete subparagraph 2 (b) of article 3, for the reasons already given. With regard to paragraph 1 of that article, it was not clear what the consequences would be if the grantor had not authorized the registration of an initial notice. The previous draft text of the paragraph had made it clear that if there was no authorization by the grantor in writing, the registration would be ineffective. Since it was important to retain that point, he proposed the amendment of the paragraph to read "Registration of an initial notice is ineffective unless authorized by the grantor in writing". Paragraphs 2 and 3 of the article should be modified similarly.

14. **Mr. Cohen** (United States of America) confirmed that the intention of his proposal regarding article 2 was that the article should provide also for the registration of a cancellation notice, since, if an initial notice had been registered in anticipation of a transaction that ultimately did not take place, a cancellation notice would need to be

registered by the secured creditor that had registered the initial notice. If authorization was limited to initial or amendment notices, that might suggest that a cancellation notice could not be filed before the creation of a security right, which was not the intention of the article. The matter could be further explained in the Guide to Enactment.

15. With regard to article 3, he agreed that paragraphs 1 to 3 should be modified to clarify that registration would be ineffective unless authorized by the grantor.

16. **Ms. Walsh** (Canada) expressed support for the latter proposal.

17. **The Chair** said he took it that the Committee wished to amend article 2 to refer to any notice and to include an explanation of the matter in the Guide to Enactment. With regard to article 3, he took it that the Committee wished to clarify, in paragraphs 1-3, that the registration of a notice would be ineffective unless authorized by the grantor; to amend subparagraph 2 (a) to refer to the security agreement or another agreement with the grantor identified in the registered notice; and to delete subparagraph 2 (b). It would be clarified in the Guide to Enactment that paragraph 3 did not apply to situations in which there was no new grantor but rather a change of the name of the grantor.

18. *It was so decided*.

19. *The substance of articles 2 and 3, subject to the agreed amendments, was approved*.

Section B. Access to registry services (articles 4-6)

Article 4

20. **The Chair** drew attention to the note to the Commission set out following the draft article.

21. **Mr. Cohen** (United States of America) said that his delegation would prefer the wording "without delay" in paragraph 3 of the article, but there was no significant difference in meaning between the two alternatives indicated in square brackets.

22. Article 4 raised an issue that was addressed in paragraph 7 of the proposal submitted by his delegation in document A/CN.9/XLVIII/CRP.3 and in the more detailed proposals that his delegation had circulated informally at the previous meeting, namely the desirability of requiring the Registry to create a security procedure that would minimize the risk of registration of unauthorized amendment or cancellation notices. He recalled that it had been difficult for the Working Group to reach a conclusion as to how to deal with such amendments and cancellations under article 20, and that significant disagreement persisted as to which of the options set out under that article, as contained in document A/CN.9/852, was preferable. The new paragraph proposed by his delegation would help to resolve that debate by stating that, in order to submit an amendment or cancellation notice, not only would the submitting party be required to fulfil the conditions stipulated in paragraph 1, but it would also have to follow the security procedure established by the Registry.

23. **Ms. Walsh** (Canada) said that her delegation did not have a particular preference with regard to the choice between the words "without delay" and "promptly" in paragraph 3, since the two alternatives were synonymous.

24. With respect to the proposed additional provision under article 4, she agreed that it would be helpful if enacting States were alerted to the importance of instituting secure access procedures for the registration of amendment and cancellation notices in order to minimize the risk of registration of amendment or cancellation notices not authorized by the secured creditor. However, the language proposed by the United States delegation in its informal paper was not of a legislative nature: the concept of a supervisory authority as referred to in the proposal was not a concept that was recognized in the Model Law, and the language used to describe possible ways of setting up secure access, while interesting, would best be set out in the Guide to Enactment. It should therefore be left to the Secretariat to draft the new text, and an explanation of the provision should be given in the Guide to Enactment. It could be indicated in square brackets that it was for the enacting State to decide on the secure access procedure or combination of procedures it wished to establish, and to insert appropriate language accordingly.

25. **Mr. Tosato** (Italy) expressed support for those comments.

26. **Mr. Sigman** (National Law Center for Inter-American Free Trade) said that, regardless of whether the language of the proposal was ideal legislative language, bearing in mind that that language could be refined, it addressed several important points that needed to be communicated to enacting States, one of those points being that if the legislature of the enacting State did not choose from among the specific procedures suggested, a security procedure must be decided on by the authority supervising the Registry. It was important to emphasize that such policy choices were for the Registry itself or the supervisory authority to make. As pointed out by the United States delegation, the proposed text would facilitate agreement on article 20 of the draft Registry Act, since it would provide the secured creditor with substantial protection against unauthorized amendments or cancellations.

27. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) added that the proposed list of procedures set out in the document circulated informally by the United States delegation was based on modern registry design, those procedures being tried and tested. Obviously, the Guide to Enactment or the regulations of the enacting State should set out the exact procedure or combination of procedures that the registry designer should implement. The Guide to Enactment could also provide examples of some additional procedures, such as a digital certificate issued to users of the registry. The list was therefore not an exhaustive list of security procedures that modern registries had implemented.

28. With regard to the choice between the sets of bracketed words in paragraph 3 of article 4, the words "without delay" more accurately reflected the fact that electronic registries responded instantaneously to users' electronic search requests and submissions of notices. It would therefore be useful if the Guide to Enactment explained that "without delay" in the context of the article meant instantaneously, in line with paragraph 99 of the UNCITRAL Guide on the Implementation of a Security Rights Registry.

29. His delegation supported the proposed reformulation of subparagraph 1 (a) to refer to "the prescribed notice form, if any", since the registry regulations reflected a hybrid registry system in which the regulations could be applied both to a purely electronic system and to a system that allowed the submission of paper notices, and while paper notices would obviously have to be submitted using a particular form, if the Registry was fully electronic there would be no form as such but rather a screen on which the user could enter data in the relevant fields. He therefore wondered whether the reference to forms was appropriate.

30. **Mr. Bazinas** (Secretariat) pointed out that, since paragraph 1 of the article applied to all types of notices, the proposed change to subparagraph 1 (a) might be unnecessary. The wording "the prescribed notice form" was in line with the wording used in the Registry Guide, which was based on the assumption that even if a notice was electronic, the screen itself would constitute a form. Therefore, if the proposed addition was approved, it would have to be explained that a "prescribed notice form" could be a paper form or an electronic form.

31. With respect to reference to a supervisory authority, the assumption made both in the Registry Guide and in the draft Model Law was that the Registry might be a public entity, such as a ministry or central bank, in which case the Registry and the supervisory authority would effectively be one and the same, or its operation might be assigned to a private entity that would be supervised by a public entity. If reference was to be made to a supervisory authority, that distinction would have to be explained.

32. **Ms. Walsh** (Canada), expressing support for those comments, said that the matter of prescribed notice forms could be clarified either in the article itself or in the Guide to Enactment.

33. While the term "supervisory authority" was used in the Convention on International Interests in Mobile Equipment, it was used neither in the Registry Guide nor in the draft Model Law or registry provisions, since it was for each enacting State to decide whether a separate entity would operate the Registry and, if so, which entity would have that power.

34. **Mr. Cohen** (United States of America), welcoming the comments and suggestions made with regard to the proposed text, said that the reason for the proposed additional wording ", if any" in subparagraph 1 (a) was that his delegation had understood the word "form" to include both paper and electronic forms, while in electronic registries there was no form in the sense of an electronic document, but rather a screen on which blank fields were to be filled in. It would therefore be helpful if the Guide to Enactment explained that the word "form" was used broadly. The alternative would be to define the term "form", which would be undesirable given the time it would take to draw up such a definition.

35. With respect to the words "supervisory authority", it had been his delegation's intention to raise the possibility of introducing that concept in order to distinguish between the entity that had the power to make decisions about registry operations and the entity that carried them out.

36. **Mr. Tirado** (International Insolvency Institute) said that the Spanish translation of the word "form", *formulario*, as used in the Spanish version of the text, would be used to refer both to paper forms and to electronic forms, and therefore required no amendment or clarification. With regard to the bracketed words in paragraph 3, he suggested the word "forthwith" as a possible alternative.

37. **Mr. Sigman** (National Law Center for Inter-American Free Trade), referring to the Committee's discussion of the concept of "supervisory authority", said that that term offered the enacting State flexibility in choosing an agency to supervise the Rgistry, and could be explained in the Model Law. It was important to emphasize that the decision to designate a supervisory authority was an important policy choice that each legislature would have to make at the time of enactment of the Model Law, particularly if the Registry Act was adopted as a separate instrument. Where such an authority was designated, it would be for that authority, rather than the Registry itself, to select the security procedures that would be implemented, as those procedures were part of the initial design of the Registry and would therefore have to be built into the registry system ab initio.

38. **The Chair** said that if the term "supervisory authority" was used, confusion might arise as to whether that authority was the same as the authority authorized to appoint and dismiss the registrar, as referred to in article 26 of the Registry Act.

39. **Mr. Bazinas** (Secretariat) said he agreed that that distinction would need to be clarified, particularly since the authority referred to in article 26 might also be authorized to establish or revise rules with respect to the operation of the Registry.

40. **Mr. Deschamps** (Canada) said that article 26 of the Registry Act as drafted was sufficient and that it should be left to enacting States to decide what title to give to an authority appointed to supervise the Registry if that authority was distinct from the body authorized to appoint and determine the duties of the registrar.

41. **Mr. Sigman** (National Law Center for Inter-American Free Trade) said that each enacting State should have the freedom to choose an entity other than the Registry to perform registry-related functions, and, where a separate authority was chosen to supervise the Registry,

important policy choices relating to the Registry's operation should be made by that authority rather than by the Registry itself.

42. **The Chair**, summing up the discussion of article 4, said that there appeared to be agreement that the term "notice form" referred to both paper and electronic forms and to screens — in that regard it had been pointed out that some registries were hybrid systems that were partly electronic and partly paper-based, thus allowing the use of both paper and electronic forms — and that a new second paragraph should be inserted to address the need for security procedures in order to reduce the risk of registration of unauthorized amendment and cancellation notices. With regard to the obligation of the Registry to communicate the reason for refusing access to a registrant or searcher, as referred to in paragraph 3, it had been considered that the words "without delay" were more appropriate than the word "promptly". With respect to the proposed security procedures, it had been pointed out that those procedures were already established in practice. Lastly, the term "supervisory authority" would not be used, but the Guide to Enactment would clarify the various possibilities with regard to the assignment of registry-related functions and responsibility for policy matters to entities other than the Registry itself.

He took it that, on that basis, the Committee wished to approve the substance of article 4 as drafted and to request the Secretariat to amend the article in the light of its discussion.

43. *It was so decided*.

44. *The substance of article 4, subject to the agreed amendments, was approved.*

Articles 5 and 6

45. **Mr. Cohen** (United States of America) proposed that, in article 5, the words "at least one" in subparagraph 1 (a) should be replaced with the words "one or more"; that the word "required" be inserted before the word "fields" in subparagraph 2 (a); and that the word "refused" in paragraph 3 be replaced with the word "rejected". He also proposed that the text in brackets in paragraph 1 of article 6 should be moved to paragraph 2 of that article.

46. **Ms. Walsh** (Canada) expressed support for the proposed change to article 5, paragraph 1 (a), as that change would clarify the provision. With regard to article 6, the text in square brackets in paragraph 1 was unnecessary, as article 2 stated expressly that a security right could be registered in advance of the conclusion of the security agreement, and there was nothing in the provisions that would suggest that the Registry was entitled to verify the existence of a security agreement.

47. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) said that, while the text in brackets might be unnecessary, it should be retained and moved to paragraph 2 of the article as proposed, since the additional guidance it provided would be of help to countries that were unfamiliar with or less experienced in the operation of such registries, and would facilitate implementation of the registry provisions.

48. The principle set out in that paragraph could be usefully applied to search requests, as there were many registries whose internal procedures required verification of the legitimacy of such requests. He therefore proposed the addition to the article of a third paragraph stating that, except as provided in article 5, the Registry was not entitled to reject or conduct any scrutiny of the content of a search request.

49. **Mr. Lee** (Republic of Korea) expressed support for the proposals made by the United States delegation with regard to articles 5 and 6. However, with regard to the proposal to move the text in brackets in paragraph 1 of article 6 to the following paragraph, his delegation would also accept the deletion of the bracketed text, for the reasons already given by the representative of Canada, and because the focus of the article was the management of registrations rather than the content of security agreements.

50. **Ms. Walsh** (Canada) said that the existing wording of article 2 sufficed. It was important that the text be concise, and the addition of the bracketed words called into question the conclusiveness of the provision.

51. **The Chair** suggested that the words "without delay" in paragraph 3 of article 5 be retained rather than the word "promptly", in line with the Committee's decision regarding the same wording in article 4 (3).

He also took it that the Committee wished to accept the drafting changes proposed with regard to article 5 and, in article 6, to delete the bracketed text from paragraph 1 and to insert a new paragraph as proposed.

52. *It was so decided*.

53. *The substance of articles 5 and 6, subject to the agreed amendments, was approved*.

Section C. Registration of a notice (articles 7-14)

Article 7

54. **Mr. Cohen** (United States of America) proposed the deletion of the words "permit or" in paragraph (a), since the article dealt with information that was required, rather than permitted, in an initial notice.

55. Given that a notice might relate to more than one grantor or secured creditor, he also proposed that a new second paragraph should be inserted to clarify that, in such cases, the information required should be entered separately for each grantor or secured creditor.

56. **Ms. Walsh** (Canada) suggested that, in order to resolve the inconsistency between the reference to permitted information in paragraph (a) and the title of the article, that title be amended to read "Information in an initial notice" and the bracketed text in paragraph (a) form the basis for a separate paragraph giving States the option of indicating that additional information was permitted. An explanation could be provided in the Guide to Enactment, which should clarify that additional information was

neither an additional identifier nor a search criterion, as was made clear in the Registry Guide and the UNCITRAL Legislative Guide on Secured Transactions, but could simply be used by a searcher where a search returned more than one registration containing the same grantor's name, in order to uniquely identify the grantor. The Guide could also explain that, while some States used information other than the grantor's name, such as a unique identification number, as an additional or alternative identifier, that approach was not recommended in the Model Law.

57. **Mr. Riffard** (France) said that while his delegation had no objection, in terms of substance, to the proposed additional paragraph concerning the need to enter separate information for additional grantors or secured creditors, he wondered whether such a provision was necessary given that the treatment of that information would depend on the technical specifications established at the stage of registry design rather than a legal norm or standard. The point should be addressed in the Guide to Enactment rather than in the registry provisions.

58. **Mr. Cohen** (United States of America) said he agreed that the problem could be resolved through system design. It could be left to the Secretariat to decide whether the matter should be addressed in the registry provisions or in the Guide to Enactment.

59. His delegation supported the proposal of the delegate of Canada to add a separate paragraph concerning additional information permitted to be entered in a notice. However, since such a paragraph would be logically inconsistent with the chapeau of the article, which introduced a list of items of required information, he suggested that the article be divided into two parts, the first dealing with required information and the second with additional information permitted to be entered in an initial notice.

60. **Mr. Deschamps** (Canada), expressing agreement with the comments made by the delegate of France, said that the technical aspects of registration should not be dealt with in the registry provisions.

61. **Mr. Sono** (Japan) said that while the point regarding notices relating to more than one grantor or secured creditors was indeed a technical matter, it should be clarified in the registry provisions, possibly in article 1, with which article 7 could be merged in view of the link between the two provisions.

62. **Mr. Dubovec** (National Law Center for Inter-American Free Trade), expressing support for that proposal, said that the requirement to enter information for each grantor or secured creditor separately, rather than being a technical rule, was an important legal rule already set out in recommendation 23 (b) of the Registry Guide, and provided important guidance to registry users.

63. His delegation also supported the proposal to delete the words "to permit" from subparagraph (a), since, if additional information was entirely optional and did not serve to distinguish, for example, grantors with identical names, it defeated the objective of providing guidance to searchers.

64. **Mr. Bazinas** (Secretariat) pointed out that recommendation 23 of the Registry Guide and recommendation 57 of the Secured Transactions Guide addressed only the required content of a notice. The Secured Transactions Guide recommended that, where necessary, information in addition to the name of the grantor should be required in the notice in order to uniquely identify the grantor, for example, where there were two or more grantors with the same name, but again, such information would be required rather than permitted.

65. **Ms. Walsh** (Canada) said that, in that light, her delegation would support the deletion of the words "permit or" in paragraph (a).

66. **Mr. Sigman** (National Law Center for Inter-American Free Trade) said that article 7 should refer only to required information, in line with recommendation 59 of the Secured Transactions Guide. If the words "permit or" in paragraph (a) were retained, "additional information" might be understood as referring to optional information. A reference to permitted information should therefore be avoided unless it could be adequately explained Moreover, only required information should be searchable, since any other information would be potentially unreliable as a means of distinguishing between grantors with the same name, and might cause confusion.

67. The registry provisions should reflect the fact that it was increasingly the practice to use a unique identification number, rather than the name of the grantor, as the sole grantor identifier and the sole search criterion in a security rights registry. That could be explained in the Guide to Enactment. In any case, it should be clarified that additional information would not be part of the grantor identifier.

68. **Mr. Lee** (Republic of Korea) said that he too supported the deletion of the words "permit or" in paragraph (a), for the reasons already given by other speakers. The information submitted to a registry through notices should be homogenous. Additional, non-mandatory information could cause confusion and inconsistency.

69. **Mr. Ayyaz** (Pakistan) said he agreed with previous speakers that the article should refer only to required information, which would include any additional information required by the enacting State. He also reiterated his suggestion, made at the previous meeting, that articles 1 and 7 of the registry provisions be merged.

70. **Mr. Bazinas** (Secretariat) pointed out that, if those provisions were merged and, in addition, the proposal to add a paragraph along the lines of recommendation 23 (b) of the Registry Guide was accepted, the new merged provision would provide that one notice might relate not only to more than one security right or security agreement, but also to more than one grantor or secured creditor. Given that article 1 was among the general provisions of

section A, which dealt with all notices, whereas article 7 fell under section C, which dealt with initial notices, the Committee would have to decide where such a provision should be included, since that provision would have to be set out as a separate, general rule applicable to all notices. The technical question of where required information for more than one grantor or secured creditor should be entered in the notice could be left to the Guide to Enactment.

71. **Ms. Walsh** (Canada) said that her delegation had no objection to such a new provision, which could be accommodated either in section C, given that some of the provisions of that section applied also to amendment and cancellation notices, or in section A. The location of the new provision could be decided on by the Secretariat on the basis of the final structure of the registry provisions.

72. **Mr. Weise** (American Bar Association) said it might be worth clarifying in the Guide to Enactment that, in line with article 23, paragraphs 1 and 2, an error in required additional information would not render the registration ineffective if that error was such that the registration could not be found, because the notice could be retrieved using the grantor's identifier as the search criterion.

73. **Mr. Sono** (Japan) said that the proposed new provision should not be introduced in section C, since that section dealt with the more technical aspects of registration.

74. **Ms. Walsh** (Canada) said that the proposed additional text should simply state that a notice might relate to more than one grantor or secured creditor, rather than addressing the technical matter of separate data for each grantor or secured creditor, and that text should not be combined with article 1.

75. **Mr. Riffard** (France) said that, rather than adding a new paragraph under article 7 as proposed, a simpler solution would be to amend paragraph (a) to refer to "the grantor or grantors" and (b) to refer to "the secured creditor or creditors". The Guide to Enactment could then state that, where there was more than one grantor or secured creditor, the required information must be entered in the designated field separately for each grantor or secured creditor.

76. **Mr. Bazinas** (Secretariat) said that the rule of interpretation traditionally applied in UNCITRAL texts, including the Secured Transactions Guide and the Registry Guide, was that the singular included the plural and vice versa.

77. **Ms. Walsh** (Canada) said that, since the addition of new text appeared to be causing complications, an explanation of the issue in the Guide to Enactment would be preferable.

78. With regard to the discussion of the name of the grantor as grantor identifier, she pointed out that draft article 7 was based on recommendations 24-26 of the Registry Guide, which had been published only recently, in 2014. If the registry provisions were to depart from such recent recommendations, that departure should be explained. While it was perfectly possible for a State to use identification numbers, the Guide to Enactment should nonetheless explain that in such cases it would still be necessary to use a name, because not all grantors would come from that State and therefore not all would have an identification number.

79. **The Chair** said it was not the intention that the registry provisions should deviate from those recommendations but, rather, that they should remain relevant as registry practices continued to evolve. The proposal to add an additional paragraph to article 7 appeared to be agreed on in principle, but it was necessary to decide where to place that paragraph and how to clarify its relationship to paragraph 1.

80. **Mr. Lee** (Republic of Korea) said that he was not convinced of the need for the proposed additional paragraph and, given that the matter of where to introduce such a provision was complicated, suggested that the provisions of article 7 as drafted were sufficient.

81. **The Chair** suggested that the issue be explained in the Guide to Enactment.

82. **Mr. Bazinas** (Secretariat) said that, as he understood it, it was agreed that the words "permit or" in paragraph (a) of article 7 should be deleted and that the Guide to Enactment should explain, in line with the Registry Guide, that the additional information referred to in that paragraph was not part of the grantor identifier and that, although some States used additional information such as unique numbers as part of that identifier, that approach was not recommended in the Model Law.

83. **The Chair** said he took it that the proposed solutions were acceptable to the Committee.

84. *It was so agreed*.

85. The substance of article 7, subject to the agreed amendments, was approved.

Article 8

86. **Mr. Cohen** (United States of America) proposed that advice to enacting States regarding the hierarchy of documents used to determine the identifier of a grantor should be included in square brackets in article 8. In establishing that hierarchy, it was important that enacting States bear in mind that in some cases, as would be addressed by the conflict-of-laws provisions, a grantor would be an entity incorporated under the laws of another State, or a person whose domicile was not located in the State where the encumbered assets were located; in such cases, the grantor would not necessarily hold any official documents issued in the enacting State. That issue would most effectively be dealt with in the Guide to Enactment rather than in the Model Law itself.

87. **Ms. Walsh** (Canada) said that since the Registry Guide addressed that issue in detail, providing examples of such situations, it would be useful if the Guide to Enactment referred to that text.

88. **Mr. Cohen** (United States of America) proposed that subparagraph 1 (c) should be replaced with additional language, in paragraphs 1 (a) and 2, that referred more simply to the most recent version of the official document used to determine the grantor's name.

89. **Ms. Walsh** (Canada) said that the wording of the article as drafted in document A/CN.9/852 should be retained, since, unlike the proposed formulation, it provided for situations in which a name was changed and the new name was shown in a document other than the one by which the previous name was established, for example, where the name of a natural person was changed by marriage and the new name was therefore stated on the marriage certificate or in the person's passport but not on his or her birth certificate. Several examples of possible approaches to such situations were set out in paragraphs 163 and 164 of the Registry Guide.

90. **Mr. Tosato** (Italy) proposed that the wording of the chapeau of paragraph 1 should be aligned with paragraph 2 to read "Where the grantor is a natural person, the grantor identifier is".

91. **Mr. Cohen** (United States of America), expressing support for that proposal, said that in the light of the point rightly made by the delegation of Canada with regard to subparagraph 1 (c), a number of possible situations might need to be addressed separately in article 8. If it was the legal name of the grantor that should be used, that should be made clear; however, "legal name" was a somewhat elusive concept in many States, and the name given in an official document might not necessarily be a person's legal name; moreover, the legislative provisions governing name changes varied from State to State. The problem of how to resolve uncertainty with regard to a grantor's name could perhaps be resolved by establishing the hierarchy of documents to be used, an approach that his delegation would prefer; however, it was not clear whether that was indeed the intention of the article.

The meeting rose at 5 p.m.

Summary record of the 1017th meeting (closed)
Held at the Vienna International Centre, Vienna, on Monday, 13 July 2015, at 2 p.m.

[A/CN.9/SR.10017]

Chair: Mr. Labardini Flores (Chair of the Committee of the Whole) (Mexico)

The meeting was called to order at 2 p.m.

Consideration of issues in the area of security interests (*continued*)

(a) Consideration and provisional approval of parts of a model law on secured transactions (A/CN.9/830, A/CN.9/836, A/CN.9/852 and A/CN.9/853; A/CN.9/XLVIII/CRP.3) (*continued*)

1. The Chair invited the Committee to resume its consideration of the articles of the draft Registry Act contained in document A/CN.9/852.

Section A. General provisions (articles 1-3) (continued)

2. **Mr. Lee** (Republic of South Korea) expressed support for the reformulation of article 1 of the draft Registry Act as proposed at the previous meeting.

3. The Chair recalled that the various proposals made at that meeting included the addition of a new provision at the beginning of the Registry Act — possibly in square brackets to indicate that the Registry Act could be adopted as a stand-alone text - to explain the purpose of the text and its relationship to the Model Law. It had also been proposed that the text of article 26, paragraph 2, of the draft Model Law be incorporated in the new provision, to the effect that any person could submit a notice to the Registry; that draft article 3 be moved up to follow the introductory text; and that the word "rights" in the heading of article 1 be replaced with the word "agreements". Furthermore, there appeared to be agreement that article 1 should be revised to clarify that a notice might relate to security rights created under multiple security agreements between the parties identified in the registered notice.

4. He took it that, subject to that latter change, the Committee wished to approve the substance of article 1 and to request the Secretariat to redraft the opening part of the Registry Act in the light of the various proposals made.

5. *It was so decided*.

6. *The substance of article 1, subject to the agreed amendment, was approved*.

7. **Mr. Cohen** (United States of America), drawing attention to article 2, proposed that the words "An initial or amendment notice" should be replaced with the words "A notice" and that the words "before or after" be inserted before the words "the conclusion of the security agreement."

8. Referring to the second sentence of the note to the Commission under article 3, he said that subparagraph 2 (b) was unnecessary and should be deleted, since if authorization by the initial grantor was required for the registration of an amendment notice that added a new grantor, that would give the initial grantor the unusual power to prevent the addition of the new grantor.

9. **Ms. Walsh** (Canada) expressed support for the proposed drafting changes with respect to article 2 and, with regard to article 3, said she agreed that paragraph 3 of the article was sufficient and subparagraph (b) of article 2 should be deleted, since the grantor identified in the initial notice should not be able to prevent the addition of the new grantor through a requirement for authorization.

10. The wording of subparagraph 2 (a) of article 3 should be clarified as referring to situations in which the grantor authorized the registration of assets either through the security agreement or through a separate authorization and no additional assets were added for which an amendment notice was registered.

11. While she agreed with the policy underlying paragraphs 3 and 4 of the article, paragraph 3 did not apply to cases in which there was no new grantor but rather a change of the name of the original grantor, a situation that was provided for in article 24. The Guide to Enactment could therefore clarify that the addition of a grantor did not necessarily mean the addition of a new grantor, even though the new name of an original grantor would be entered in the amendment notice.

12. **Mr. Sono** (Japan), referring to article 2, asked whether the intended consequence of the proposal made by the United States delegation to replace the words "An initial or amendment notice" with the words "A notice" was that the provision would apply to any notice, including cancellation notices. If that was not the case, it would be preferable to retain the original wording.

13. His delegation supported the proposal to delete subparagraph 2 (b) of article 3, for the reasons already given. With regard to paragraph 1 of that article, it was not clear what the consequences would be if the grantor had not authorized the registration of an initial notice. The previous draft text of the paragraph had made it clear that if there was no authorization by the grantor in writing, the registration would be ineffective. Since it was important to retain that point, he proposed the amendment of the paragraph to read "Registration of an initial notice is ineffective unless authorized by the grantor in writing". Paragraphs 2 and 3 of the article should be modified similarly.

14. **Mr. Cohen** (United States of America) confirmed that the intention of his proposal regarding article 2 was that the article should provide also for the registration of a cancellation notice, since, if an initial notice had been registered in anticipation of a transaction that ultimately did not take place, a cancellation notice would need to be

registered by the secured creditor that had registered the initial notice. If authorization was limited to initial or amendment notices, that might suggest that a cancellation notice could not be filed before the creation of a security right, which was not the intention of the article. The matter could be further explained in the Guide to Enactment.

15. With regard to article 3, he agreed that paragraphs 1 to 3 should be modified to clarify that registration would be ineffective unless authorized by the grantor.

16. **Ms. Walsh** (Canada) expressed support for the latter proposal.

17. **The Chair** said he took it that the Committee wished to amend article 2 to refer to any notice and to include an explanation of the matter in the Guide to Enactment. With regard to article 3, he took it that the Committee wished to clarify, in paragraphs 1-3, that the registration of a notice would be ineffective unless authorized by the grantor; to amend subparagraph 2 (a) to refer to the security agreement or another agreement with the grantor identified in the registered notice; and to delete subparagraph 2 (b). It would be clarified in the Guide to Enactment that paragraph 3 did not apply to situations in which there was no new grantor but rather a change of the name of the grantor.

18. *It was so decided*.

19. *The substance of articles 2 and 3, subject to the agreed amendments, was approved*.

Section B. Access to registry services (articles 4-6)

Article 4

20. **The Chair** drew attention to the note to the Commission set out following the draft article.

21. **Mr. Cohen** (United States of America) said that his delegation would prefer the wording "without delay" in paragraph 3 of the article, but there was no significant difference in meaning between the two alternatives indicated in square brackets.

22. Article 4 raised an issue that was addressed in paragraph 7 of the proposal submitted by his delegation in document A/CN.9/XLVIII/CRP.3 and in the more detailed proposals that his delegation had circulated informally at the previous meeting, namely the desirability of requiring the Registry to create a security procedure that would minimize the risk of registration of unauthorized amendment or cancellation notices. He recalled that it had been difficult for the Working Group to reach a conclusion as to how to deal with such amendments and cancellations under article 20, and that significant disagreement persisted as to which of the options set out under that article, as contained in document A/CN.9/852, was preferable. The new paragraph proposed by his delegation would help to resolve that debate by stating that, in order to submit an amendment or cancellation notice, not only would the submitting party be required to fulfil the conditions stipulated in paragraph 1, but it would also have to follow the security procedure established by the Registry.

23. **Ms. Walsh** (Canada) said that her delegation did not have a particular preference with regard to the choice between the words "without delay" and "promptly" in paragraph 3, since the two alternatives were synonymous.

24. With respect to the proposed additional provision under article 4, she agreed that it would be helpful if enacting States were alerted to the importance of instituting secure access procedures for the registration of amendment and cancellation notices in order to minimize the risk of registration of amendment or cancellation notices not authorized by the secured creditor. However, the language proposed by the United States delegation in its informal paper was not of a legislative nature: the concept of a supervisory authority as referred to in the proposal was not a concept that was recognized in the Model Law, and the language used to describe possible ways of setting up secure access, while interesting, would best be set out in the Guide to Enactment. It should therefore be left to the Secretariat to draft the new text, and an explanation of the provision should be given in the Guide to Enactment. It could be indicated in square brackets that it was for the enacting State to decide on the secure access procedure or combination of procedures it wished to establish, and to insert appropriate language accordingly.

25. **Mr. Tosato** (Italy) expressed support for those comments.

26. **Mr. Sigman** (National Law Center for Inter-American Free Trade) said that, regardless of whether the language of the proposal was ideal legislative language, bearing in mind that that language could be refined, it addressed several important points that needed to be communicated to enacting States, one of those points being that if the legislature of the enacting State did not choose from among the specific procedures suggested, a security procedure must be decided on by the authority supervising the Registry. It was important to emphasize that such policy choices were for the Registry itself or the supervisory authority to make. As pointed out by the United States delegation, the proposed text would facilitate agreement on article 20 of the draft Registry Act, since it would provide the secured creditor with substantial protection against unauthorized amendments or cancellations.

27. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) added that the proposed list of procedures set out in the document circulated informally by the United States delegation was based on modern registry design, those procedures being tried and tested. Obviously, the Guide to Enactment or the regulations of the enacting State should set out the exact procedure or combination of procedures that the registry designer should implement. The Guide to Enactment could also provide examples of some additional procedures, such as a digital certificate issued to users of the registry. The list was therefore not an exhaustive list of security procedures that modern registries had implemented.

28. With regard to the choice between the sets of bracketed words in paragraph 3 of article 4, the words "without delay" more accurately reflected the fact that electronic registries responded instantaneously to users' electronic search requests and submissions of notices. It would therefore be useful if the Guide to Enactment explained that "without delay" in the context of the article meant instantaneously, in line with paragraph 99 of the UNCITRAL Guide on the Implementation of a Security Rights Registry.

29. His delegation supported the proposed reformulation of subparagraph 1 (a) to refer to "the prescribed notice form, if any", since the registry regulations reflected a hybrid registry system in which the regulations could be applied both to a purely electronic system and to a system that allowed the submission of paper notices, and while paper notices would obviously have to be submitted using a particular form, if the Registry was fully electronic there would be no form as such but rather a screen on which the user could enter data in the relevant fields. He therefore wondered whether the reference to forms was appropriate.

30. **Mr. Bazinas** (Secretariat) pointed out that, since paragraph 1 of the article applied to all types of notices, the proposed change to subparagraph 1 (a) might be unnecessary. The wording "the prescribed notice form" was in line with the wording used in the Registry Guide, which was based on the assumption that even if a notice was electronic, the screen itself would constitute a form. Therefore, if the proposed addition was approved, it would have to be explained that a "prescribed notice form" could be a paper form or an electronic form.

31. With respect to reference to a supervisory authority, the assumption made both in the Registry Guide and in the draft Model Law was that the Registry might be a public entity, such as a ministry or central bank, in which case the Registry and the supervisory authority would effectively be one and the same, or its operation might be assigned to a private entity that would be supervised by a public entity. If reference was to be made to a supervisory authority, that distinction would have to be explained.

32. **Ms. Walsh** (Canada), expressing support for those comments, said that the matter of prescribed notice forms could be clarified either in the article itself or in the Guide to Enactment.

33. While the term "supervisory authority" was used in the Convention on International Interests in Mobile Equipment, it was used neither in the Registry Guide nor in the draft Model Law or registry provisions, since it was for each enacting State to decide whether a separate entity would operate the Registry and, if so, which entity would have that power.

34. **Mr. Cohen** (United States of America), welcoming the comments and suggestions made with regard to the proposed text, said that the reason for the proposed additional wording ", if any" in subparagraph 1 (a) was that his delegation had understood the word "form" to include both paper and electronic forms, while in electronic registries there was no form in the sense of an electronic document, but rather a screen on which blank fields were to be filled in. It would therefore be helpful if the Guide to Enactment explained that the word "form" was used broadly. The alternative would be to define the term "form", which would be undesirable given the time it would take to draw up such a definition.

35. With respect to the words "supervisory authority", it had been his delegation's intention to raise the possibility of introducing that concept in order to distinguish between the entity that had the power to make decisions about registry operations and the entity that carried them out.

36. **Mr. Tirado** (International Insolvency Institute) said that the Spanish translation of the word "form", *formulario*, as used in the Spanish version of the text, would be used to refer both to paper forms and to electronic forms, and therefore required no amendment or clarification. With regard to the bracketed words in paragraph 3, he suggested the word "forthwith" as a possible alternative.

37. **Mr. Sigman** (National Law Center for Inter-American Free Trade), referring to the Committee's discussion of the concept of "supervisory authority", said that that term offered the enacting State flexibility in choosing an agency to supervise the Rgistry, and could be explained in the Model Law. It was important to emphasize that the decision to designate a supervisory authority was an important policy choice that each legislature would have to make at the time of enactment of the Model Law, particularly if the Registry Act was adopted as a separate instrument. Where such an authority was designated, it would be for that authority, rather than the Registry itself, to select the security procedures that would be implemented, as those procedures were part of the initial design of the Registry and would therefore have to be built into the registry system ab initio.

38. **The Chair** said that if the term "supervisory authority" was used, confusion might arise as to whether that authority was the same as the authority authorized to appoint and dismiss the registrar, as referred to in article 26 of the Registry Act.

39. **Mr. Bazinas** (Secretariat) said he agreed that that distinction would need to be clarified, particularly since the authority referred to in article 26 might also be authorized to establish or revise rules with respect to the operation of the Registry.

40. **Mr. Deschamps** (Canada) said that article 26 of the Registry Act as drafted was sufficient and that it should be left to enacting States to decide what title to give to an authority appointed to supervise the Registry if that authority was distinct from the body authorized to appoint and determine the duties of the registrar.

41. **Mr. Sigman** (National Law Center for Inter-American Free Trade) said that each enacting State should have the freedom to choose an entity other than the Registry to perform registry-related functions, and, where a separate authority was chosen to supervise the Registry,

important policy choices relating to the Registry's operation should be made by that authority rather than by the Registry itself.

42. **The Chair**, summing up the discussion of article 4, said that there appeared to be agreement that the term "notice form" referred to both paper and electronic forms and to screens — in that regard it had been pointed out that some registries were hybrid systems that were partly electronic and partly paper-based, thus allowing the use of both paper and electronic forms — and that a new second paragraph should be inserted to address the need for security procedures in order to reduce the risk of registration of unauthorized amendment and cancellation notices. With regard to the obligation of the Registry to communicate the reason for refusing access to a registrant or searcher, as referred to in paragraph 3, it had been considered that the words "without delay" were more appropriate than the word "promptly". With respect to the proposed security procedures, it had been pointed out that those procedures were already established in practice. Lastly, the term "supervisory authority" would not be used, but the Guide to Enactment would clarify the various possibilities with regard to the assignment of registry-related functions and responsibility for policy matters to entities other than the Registry itself.

He took it that, on that basis, the Committee wished to approve the substance of article 4 as drafted and to request the Secretariat to amend the article in the light of its discussion.

43. *It was so decided*.

44. *The substance of article 4, subject to the agreed amendments, was approved.*

Articles 5 and 6

45. **Mr. Cohen** (United States of America) proposed that, in article 5, the words "at least one" in subparagraph 1 (a) should be replaced with the words "one or more"; that the word "required" be inserted before the word "fields" in subparagraph 2 (a); and that the word "refused" in paragraph 3 be replaced with the word "rejected". He also proposed that the text in brackets in paragraph 1 of article 6 should be moved to paragraph 2 of that article.

46. **Ms. Walsh** (Canada) expressed support for the proposed change to article 5, paragraph 1 (a), as that change would clarify the provision. With regard to article 6, the text in square brackets in paragraph 1 was unnecessary, as article 2 stated expressly that a security right could be registered in advance of the conclusion of the security agreement, and there was nothing in the provisions that would suggest that the Registry was entitled to verify the existence of a security agreement.

47. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) said that, while the text in brackets might be unnecessary, it should be retained and moved to paragraph 2 of the article as proposed, since the additional guidance it provided would be of help to countries that were unfamiliar with or less experienced in the operation of such registries, and would facilitate implementation of the registry provisions.

48. The principle set out in that paragraph could be usefully applied to search requests, as there were many registries whose internal procedures required verification of the legitimacy of such requests. He therefore proposed the addition to the article of a third paragraph stating that, except as provided in article 5, the Registry was not entitled to reject or conduct any scrutiny of the content of a search request.

49. **Mr. Lee** (Republic of Korea) expressed support for the proposals made by the United States delegation with regard to articles 5 and 6. However, with regard to the proposal to move the text in brackets in paragraph 1 of article 6 to the following paragraph, his delegation would also accept the deletion of the bracketed text, for the reasons already given by the representative of Canada, and because the focus of the article was the management of registrations rather than the content of security agreements.

50. **Ms. Walsh** (Canada) said that the existing wording of article 2 sufficed. It was important that the text be concise, and the addition of the bracketed words called into question the conclusiveness of the provision.

51. **The Chair** suggested that the words "without delay" in paragraph 3 of article 5 be retained rather than the word "promptly", in line with the Committee's decision regarding the same wording in article 4 (3).

He also took it that the Committee wished to accept the drafting changes proposed with regard to article 5 and, in article 6, to delete the bracketed text from paragraph 1 and to insert a new paragraph as proposed.

52. *It was so decided*.

53. *The substance of articles 5 and 6, subject to the agreed amendments, was approved*.

Section C. Registration of a notice (articles 7-14)

Article 7

54. **Mr. Cohen** (United States of America) proposed the deletion of the words "permit or" in paragraph (a), since the article dealt with information that was required, rather than permitted, in an initial notice.

55. Given that a notice might relate to more than one grantor or secured creditor, he also proposed that a new second paragraph should be inserted to clarify that, in such cases, the information required should be entered separately for each grantor or secured creditor.

56. **Ms. Walsh** (Canada) suggested that, in order to resolve the inconsistency between the reference to permitted information in paragraph (a) and the title of the article, that title be amended to read "Information in an initial notice" and the bracketed text in paragraph (a) form the basis for a separate paragraph giving States the option of indicating that additional information was permitted. An explanation could be provided in the Guide to Enactment, which should clarify that additional information was

neither an additional identifier nor a search criterion, as was made clear in the Registry Guide and the UNCITRAL Legislative Guide on Secured Transactions, but could simply be used by a searcher where a search returned more than one registration containing the same grantor's name, in order to uniquely identify the grantor. The Guide could also explain that, while some States used information other than the grantor's name, such as a unique identification number, as an additional or alternative identifier, that approach was not recommended in the Model Law.

57. **Mr. Riffard** (France) said that while his delegation had no objection, in terms of substance, to the proposed additional paragraph concerning the need to enter separate information for additional grantors or secured creditors, he wondered whether such a provision was necessary given that the treatment of that information would depend on the technical specifications established at the stage of registry design rather than a legal norm or standard. The point should be addressed in the Guide to Enactment rather than in the registry provisions.

58. **Mr. Cohen** (United States of America) said he agreed that the problem could be resolved through system design. It could be left to the Secretariat to decide whether the matter should be addressed in the registry provisions or in the Guide to Enactment.

59. His delegation supported the proposal of the delegate of Canada to add a separate paragraph concerning additional information permitted to be entered in a notice. However, since such a paragraph would be logically inconsistent with the chapeau of the article, which introduced a list of items of required information, he suggested that the article be divided into two parts, the first dealing with required information and the second with additional information permitted to be entered in an initial notice.

60. **Mr. Deschamps** (Canada), expressing agreement with the comments made by the delegate of France, said that the technical aspects of registration should not be dealt with in the registry provisions.

61. **Mr. Sono** (Japan) said that while the point regarding notices relating to more than one grantor or secured creditors was indeed a technical matter, it should be clarified in the registry provisions, possibly in article 1, with which article 7 could be merged in view of the link between the two provisions.

62. **Mr. Dubovec** (National Law Center for Inter-American Free Trade), expressing support for that proposal, said that the requirement to enter information for each grantor or secured creditor separately, rather than being a technical rule, was an important legal rule already set out in recommendation 23 (b) of the Registry Guide, and provided important guidance to registry users.

63. His delegation also supported the proposal to delete the words "to permit" from subparagraph (a), since, if additional information was entirely optional and did not serve to distinguish, for example, grantors with identical names, it defeated the objective of providing guidance to searchers.

64. **Mr. Bazinas** (Secretariat) pointed out that recommendation 23 of the Registry Guide and recommendation 57 of the Secured Transactions Guide addressed only the required content of a notice. The Secured Transactions Guide recommended that, where necessary, information in addition to the name of the grantor should be required in the notice in order to uniquely identify the grantor, for example, where there were two or more grantors with the same name, but again, such information would be required rather than permitted.

65. **Ms. Walsh** (Canada) said that, in that light, her delegation would support the deletion of the words "permit or" in paragraph (a).

66. **Mr. Sigman** (National Law Center for Inter-American Free Trade) said that article 7 should refer only to required information, in line with recommendation 59 of the Secured Transactions Guide. If the words "permit or" in paragraph (a) were retained, "additional information" might be understood as referring to optional information. A reference to permitted information should therefore be avoided unless it could be adequately explained Moreover, only required information should be searchable, since any other information would be potentially unreliable as a means of distinguishing between grantors with the same name, and might cause confusion.

67. The registry provisions should reflect the fact that it was increasingly the practice to use a unique identification number, rather than the name of the grantor, as the sole grantor identifier and the sole search criterion in a security rights registry. That could be explained in the Guide to Enactment. In any case, it should be clarified that additional information would not be part of the grantor identifier.

68. **Mr. Lee** (Republic of Korea) said that he too supported the deletion of the words "permit or" in paragraph (a), for the reasons already given by other speakers. The information submitted to a registry through notices should be homogenous. Additional, non-mandatory information could cause confusion and inconsistency.

69. **Mr. Ayyaz** (Pakistan) said he agreed with previous speakers that the article should refer only to required information, which would include any additional information required by the enacting State. He also reiterated his suggestion, made at the previous meeting, that articles 1 and 7 of the registry provisions be merged.

70. **Mr. Bazinas** (Secretariat) pointed out that, if those provisions were merged and, in addition, the proposal to add a paragraph along the lines of recommendation 23 (b) of the Registry Guide was accepted, the new merged provision would provide that one notice might relate not only to more than one security right or security agreement, but also to more than one grantor or secured creditor. Given that article 1 was among the general provisions of

section A, which dealt with all notices, whereas article 7 fell under section C, which dealt with initial notices, the Committee would have to decide where such a provision should be included, since that provision would have to be set out as a separate, general rule applicable to all notices. The technical question of where required information for more than one grantor or secured creditor should be entered in the notice could be left to the Guide to Enactment.

71. **Ms. Walsh** (Canada) said that her delegation had no objection to such a new provision, which could be accommodated either in section C, given that some of the provisions of that section applied also to amendment and cancellation notices, or in section A. The location of the new provision could be decided on by the Secretariat on the basis of the final structure of the registry provisions.

72. **Mr. Weise** (American Bar Association) said it might be worth clarifying in the Guide to Enactment that, in line with article 23, paragraphs 1 and 2, an error in required additional information would not render the registration ineffective if that error was such that the registration could not be found, because the notice could be retrieved using the grantor's identifier as the search criterion.

73. **Mr. Sono** (Japan) said that the proposed new provision should not be introduced in section C, since that section dealt with the more technical aspects of registration.

74. **Ms. Walsh** (Canada) said that the proposed additional text should simply state that a notice might relate to more than one grantor or secured creditor, rather than addressing the technical matter of separate data for each grantor or secured creditor, and that text should not be combined with article 1.

75. **Mr. Riffard** (France) said that, rather than adding a new paragraph under article 7 as proposed, a simpler solution would be to amend paragraph (a) to refer to "the grantor or grantors" and (b) to refer to "the secured creditor or creditors". The Guide to Enactment could then state that, where there was more than one grantor or secured creditor, the required information must be entered in the designated field separately for each grantor or secured creditor.

76. **Mr. Bazinas** (Secretariat) said that the rule of interpretation traditionally applied in UNCITRAL texts, including the Secured Transactions Guide and the Registry Guide, was that the singular included the plural and vice versa.

77. **Ms. Walsh** (Canada) said that, since the addition of new text appeared to be causing complications, an explanation of the issue in the Guide to Enactment would be preferable.

78. With regard to the discussion of the name of the grantor as grantor identifier, she pointed out that draft article 7 was based on recommendations 24-26 of the Registry Guide, which had been published only recently, in 2014. If the registry provisions were to depart from such recent recommendations, that departure should be explained. While it was perfectly possible for a State to use identification numbers, the Guide to Enactment should nonetheless explain that in such cases it would still be necessary to use a name, because not all grantors would come from that State and therefore not all would have an identification number.

79. **The Chair** said it was not the intention that the registry provisions should deviate from those recommendations but, rather, that they should remain relevant as registry practices continued to evolve. The proposal to add an additional paragraph to article 7 appeared to be agreed on in principle, but it was necessary to decide where to place that paragraph and how to clarify its relationship to paragraph 1.

80. **Mr. Lee** (Republic of Korea) said that he was not convinced of the need for the proposed additional paragraph and, given that the matter of where to introduce such a provision was complicated, suggested that the provisions of article 7 as drafted were sufficient.

81. **The Chair** suggested that the issue be explained in the Guide to Enactment.

82. **Mr. Bazinas** (Secretariat) said that, as he understood it, it was agreed that the words "permit or" in paragraph (a) of article 7 should be deleted and that the Guide to Enactment should explain, in line with the Registry Guide, that the additional information referred to in that paragraph was not part of the grantor identifier and that, although some States used additional information such as unique numbers as part of that identifier, that approach was not recommended in the Model Law.

83. **The Chair** said he took it that the proposed solutions were acceptable to the Committee.

84. *It was so agreed*.

85. The substance of article 7, subject to the agreed amendments, was approved.

Article 8

86. **Mr. Cohen** (United States of America) proposed that advice to enacting States regarding the hierarchy of documents used to determine the identifier of a grantor should be included in square brackets in article 8. In establishing that hierarchy, it was important that enacting States bear in mind that in some cases, as would be addressed by the conflict-of-laws provisions, a grantor would be an entity incorporated under the laws of another State, or a person whose domicile was not located in the State where the encumbered assets were located; in such cases, the grantor would not necessarily hold any official documents issued in the enacting State. That issue would most effectively be dealt with in the Guide to Enactment rather than in the Model Law itself.

87. **Ms. Walsh** (Canada) said that since the Registry Guide addressed that issue in detail, providing examples of such situations, it would be useful if the Guide to Enactment referred to that text.

88. **Mr. Cohen** (United States of America) proposed that subparagraph 1 (c) should be replaced with additional language, in paragraphs 1 (a) and 2, that referred more simply to the most recent version of the official document used to determine the grantor's name.

89. **Ms. Walsh** (Canada) said that the wording of the article as drafted in document A/CN.9/852 should be retained, since, unlike the proposed formulation, it provided for situations in which a name was changed and the new name was shown in a document other than the one by which the previous name was established, for example, where the name of a natural person was changed by marriage and the new name was therefore stated on the marriage certificate or in the person's passport but not on his or her birth certificate. Several examples of possible approaches to such situations were set out in paragraphs 163 and 164 of the Registry Guide.

90. **Mr. Tosato** (Italy) proposed that the wording of the chapeau of paragraph 1 should be aligned with paragraph 2 to read "Where the grantor is a natural person, the grantor identifier is".

91. **Mr. Cohen** (United States of America), expressing support for that proposal, said that in the light of the point rightly made by the delegation of Canada with regard to subparagraph 1 (c), a number of possible situations might need to be addressed separately in article 8. If it was the legal name of the grantor that should be used, that should be made clear; however, "legal name" was a somewhat elusive concept in many States, and the name given in an official document might not necessarily be a person's legal name; moreover, the legislative provisions governing name changes varied from State to State. The problem of how to resolve uncertainty with regard to a grantor's name could perhaps be resolved by establishing the hierarchy of documents to be used, an approach that his delegation would prefer; however, it was not clear whether that was indeed the intention of the article.

The meeting rose at 5 p.m.

Summary record of the 1022nd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 16 July 2015, at 9.30 a.m.

[A/CN.9/SR.1022]
(Document was released after the Yearbook had been submitted for publication.)

Chair: Mr. Labardini Flores (Chair of the Committee of the Whole) (Mexico)

Summary record of the second part (public) of the 1022nd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 16 July 2015, at noon.

[A/CN.9/SR.1022/Add.1]

Chair: Mr. Lee (Vice-Chair) (Republic of Korea)

Consideration of issues in the area of security interests (*continued*)

(b) Possible future work in the area of security interests

1. **Mr. Bazinas** (Secretariat), introducing the sub-item, recalled that Working Group VI (Security Interests), at its twenty-seventh session, had recommended to the Commission the preparation of a guide to enactment of the draft Model Law on Secured Transactions. The Working Group had identified a number of matters to be clarified in the Guide to Enactment, which would also explain the options offered to enacting States in various articles of the Model Law. The Working Group had considered that such a guide would assist legislators in preparing legislation based on the Model Law and would provide useful guidance, particularly for States with limited familiarity with the types of secured transaction covered by the Model Law. The Guide to Enactment would draw on the *travaux préparatoires* of the draft Model Law and would also be helpful to users of the text. The Working Group had noted that the Guide to Enactment would briefly explain the thrust of each provision or section of the draft Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or other UNCITRAL texts on secured transactions. Lastly, the Working Group had considered that, in order to avoid duplication, the draft Guide to Enactment should include extensive cross references to those texts, particularly the UNCITRAL Legislative Guide on Secured Transactions and the UNCITRAL Guide on the Implementation of a Security Rights Registry.

2. He also recalled that the Commission had already noted, during the discussion of its work programme under agenda item 18, that it would consider other possible future topics in the field of security interests at a future time and on the basis of more detailed information from the Secretariat, those possible topics being a contractual guide on secured transactions, in particular for small and medium-sized enterprises and enterprises in developing countries, and a uniform law text on intellectual property licensing. That discussion was reflected in subparagraph 4 (e) of document A/CN.9/XLVIII.CRP.1/Add.17, which was the section of the draft report dealing with the Commission's work programme. A cross reference to that section would be included in the part of the report concerning the current agenda sub-item under discussion, and vice versa.

3. **Ms. Sabo** (Canada) said that her delegation supported the proposal to prepare a guide to enactment of the draft Model Law on Secured Transactions. However, it was important that the guide should not reproduce material already included in the Secured Transactions Guide and the Registry Guide, as those texts were already voluminous and contained a great deal of useful information. It was essential that the Guide should include extensive cross references and should be consistent, and that any differences in policy should be explained. The Guide should focus more on providing guidance for legislators than on providing guidance for users.

4. **Mr. Dennis** (United States of America), expressing support for the comments made by the representative of Canada, said that the Guide to Enactment should be short and contain cross references to the Registry Guide, the Secured Transactions Guide and the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property rather than duplicating the material contained in those texts. It should give a brief explanation of the provisions of the Model Law and explain the options offered under some of those provisions.

5. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat would need clear instructions regarding the nature of the work to be undertaken on the Guide to Enactment. Such documents were usually prepared by the Secretariat without reference to a working group, but the Commission might wish to refer the work on the draft Guide to Working Group VI.

6. **Mr. Bellenger** (France) asked whether that would be the case with regard to draft Guide to Enactment given that the Working Group already had a great deal of work to do in the coming months.

7. **Mr. Bazinas** (Secretariat) said that the Secretariat would prepare a draft of the Guide, but it was up to the Commission to decide whether the document would need to be approved by the Working Group and what resources would be allocated for that purpose.

8. **Mr. Sorieul** (Secretary of the Commission) said that the question was how much conference time should be spent on the draft Guide to Enactment, bearing in mind that a great deal of Commission time had been used for the detailed consideration of the draft Model Law and that two other possible areas of work for Working Group VI had been identified, as already mentioned.

9. **Ms. Sabo** (Canada) said that it would be useful for the Working Group to consider the draft Guide to Enactment together with the Model Law in order to ensure the coherence of and consistency between the two texts. Moreover, such an exercise would help to identify and resolve any problems in the drafting of the Model Law. However, that consideration should not be as detailed as the consideration of the draft Model Law, and need not take up much of the Working Group's time. In that regard,

she was confident in the ability of the Working Group to work efficiently.

10. **Mr. Dennis** (United States of America), expressing agreement with the comments made by the representative of Canada, said it was important that the Working Group should be in a position to complete its work on the Model Law in order for that text to be presented to the Commission for adoption in 2016. Given that a detailed review of the draft Guide to Enactment would be unnecessary, its consideration should not take up too much of the Working Group's time.

11. **The Chair** said that he took it, in the light of the comments made, that the Commission wished to refer the preparation of the draft Guide to Enactment to Working Group VI with the understanding that the Guide to Enactment should be short and should focus on providing guidance for legislators. It should also include cross references to previously adopted UNCITRAL texts on secured transactions.

12. It was so decided.

(c) Coordination and cooperation in the area of security interests

13. **Mr. Bazinas** (Secretariat) invited the Commission to take note of the work of the Secretariat and the progress achieved with respect to four items: the revision of the World Bank Insolvency and Creditor Rights Standard to take into account the key recommendations of the Secured Transactions Guide and other texts on security interests prepared by the Commission; the coordination efforts with the European Commission with a view to ensuring a coordinated approach to the issue of the law applicable to third-party effects of assignments of receivables, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade, the Secured Transactions Guide and the draft Model Law on Secured Transactions; the coordination efforts with the International Institute for the Unification of Private Law (Unidroit) with respect to a fourth protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment; and the coordination efforts with the International Finance Corporation, the Organization of American States and other organizations in providing technical assistance and assistance with respect to local capacity-building in the area of security interests. The Commission might wish to renew the mandate given to the Secretariat to continue with those coordination and cooperation efforts.

14. **Ms. Sabo** (Canada), supported by **Mr. Dennis** (United States of America), reiterated the view already expressed by her delegation in the context of coordination and cooperation under item 14 of the Commission's agenda that it was very important to ensure that UNCITRAL texts were reflected to the extent possible in the work of other organizations in the same subject area. With respect to the revision of the World Bank Insolvency and Creditor Rights Standard, the Commission should simply adapt the Secretariat's mandate as required to coordinate with the World Bank as the work on that Standard proceeded, as her delegation had already suggested during the discussion of agenda item 14.

15. **The Chair** said that the Secretariat would continue its efforts to ensure that the Commission's work in the area of security interests was reflected to the greatest possible extent in the relevant texts of other international organizations, and to promote complementarity in that regard through further cooperation.

Election of officers (*continued*)

16. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat had received a note verbale from the Permanent Mission of South Africa informing it that Mr. Oyugi (Kenya) had been nominated by the African Group to serve as Vice-Chair of the Commission. He took it that the Commission wished to elect by acclamation the candidate proposed.

17. *Mr. Oyugi (Kenya) was elected Vice-Chair by acclamation.*

The meeting rose at 12.30 p.m

Summary record of the 1023rd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 16 July 2015, at 2 p.m.

[A/CN.9/SR.1023]

Chair: Mr. Lee (Vice-Chair) (Republic of Korea)

The meeting was called to order at 2.10 p.m.

Adoption of the report of the Commission (*continued*)

82. **The Chair** invited the Rapporteur to introduce the sections of the draft report of the Commission on the work of its forty-eighth session relating to security interests.

83. **Mr. Petrovic** (Croatia), Rapporteur, introduced documents A/CN.9/XLVIII/CRP.1/Add.21-23, which together would form the report of the Committee of the Whole on its work on agenda item 5 (a).

A/CN.9/XLVIII/CRP.1/Add.21

84. **Mr. Dennis** (United States of America) requested that the draft report reflect the fact that his delegation had submitted a formal proposal on agenda item 5, contained in document A/CN.9/XLVIII/CRP.3, which had erroneously been given the heading "Draft report".

85. **Mr. Bazinas** (Secretariat) said that, in accordance with the usual practice, references to conference room papers would be removed in the final report, which would contain references only to other parts of the report. Conference room papers officially ceased to exist after each session. In order to address the request made by the United States delegation, he proposed the addition of wording in section A of document A/CN.9/XLVIII/CRP.1/Add.21 to the effect that the United States delegation had submitted a proposal with respect to agenda item 5 (a).

86. *It was so decided.*

87. **Mr. Bazinas** (Secretariat) said that the first two headings in section B should be reversed, since sections B, C and D of the part of the report relating to agenda item 5 would correspond to sub-items (a) to (c) and subsection B 2 would concern the adoption of the report of the Committee of the Whole.

88. *It was so agreed.*

89. *Document A/CN.9/XLVIII/CRP.1/Add.21, as orally amended, was adopted.*

A/CN.9/XLVIII/CRP.1/Add.22

90. **Mr. Bazinas** (Secretariat), drawing attention to paragraph 5 of the document, said that the words "to comply" should be inserted after the words "unless the failure of the registrant". In that regard, he reminded the Commission that delegations were invited to draw the Secretariat's attention to any typographical errors, which would be corrected by the Secretariat, or language issues, which would be communicated to the translation services.

91. **Mr. Sorieul** (Secretary of the Commission) added that, consistent with customary practice, the Secretariat would review the entire content of the report, including those parts already adopted, and correct any typographical or grammatical errors, also restructuring the content as appropriate. While the Secretariat considered itself entitled to make such adjustments, it sought confirmation that that was the Commission's understanding.

92. *It was so agreed.*

93. *Document A/CN.9/XLVIII/CRP.1/Add.22, as orally amended, was adopted.*

A/CN.9/XLVIII/CRP.1/Add.23

94. **Mr. Weise** (American Bar Association), drawing attention to paragraph 14 of the document, proposed that the words "a minor error" in the sixth sentence be replaced with the words "an error", for the sake of consistency with the other references to error in the remainder of the paragraph.

95. *It was so decided.*

96. **Mr. Bazinas** (Secretariat) proposed that, in order to reflect a decision made by the Committee of the Whole at its final meeting with respect to article 24 of the draft Registry Act, an additional sentence reading "It was also agreed that article 24 should be revised to address the impact of the secured creditor's failure to register an amendment notice" be inserted before the final sentence of paragraph 18 of document A/CN.9/XLVIII/CRP.1/Add.23 to address the points raised in part (b) of the note to the Commission on article 24 as contained in document A/CN.9/852.

97. *It was so decided.*

98. *Document A/CN.9/XLVIII/CRP.1/Add.23, as orally amended, was adopted.*

Articles 25-29 of the draft Registry Act and provisional approval of parts of the draft Model Law on Secured Transactions

99. **Mr. Bazinas** (Secretariat) said that, in order to reflect the decisions reached by the Committee of the Whole with respect to articles 25-29 of the draft Registry Act, it was proposed that the following text be inserted in the report of the Commission:

100. On article 25:

> "It was agreed that, for the time being, all options would be retained in article 25 of the draft Registry Act and discussed in the Guide to Enactment. In addition, it was agreed that options A and B should be revised to address successive transfers of an encumbered asset and to clarify that they applied only to transfers of an encumbered asset in which the

transferee did not acquire its rights free of the security right. Moreover, it was agreed that the relationship between article 25 of the draft Registry Act and article 42 of the draft Model Law should be further clarified. It was also agreed that, for article 25 of the draft Registry Act to apply to a transferee of an encumbered asset that would be treated as a new grantor, the definition of "grantor" in article 2 of the draft Model Law would need to be revised to include a transferee of an encumbered asset. Subject to those changes, the Committee approved the substance of article 25 of the draft Registry Act."

101. On article 26:

"The Committee approved the substance of article 26 of the draft Registry Act unchanged".

102. On article 27:

"It was agreed that paragraph 1 of article 27 of the draft Registry Act should be aligned more closely with recommendation 15 of the Registry Guide. In addition, it was agreed that paragraph 2 should be revised to deal with the retrieval of notices that matched closely the search criterion and with global amendment notices. Moreover, it was agreed that the bracketed text in paragraph 3 should be clarified and retained outside square brackets. Subject to those changes, the Committee approved the substance of article 27 of the draft Registry Act."

103. On article 28:

"It was agreed that paragraph 2 of draft article 28 of the draft Registry Act should be revised to provide for a direct obligation of the Registry to preserve the registry record and to reconstruct it in the event of loss. It was also agreed that the Guide to Enactment should avoid referring to any particular technique used with respect to the preservation and reconstruction of records. Subject to those changes, the Committee approved the substance of article 28 of the draft Registry Act."

104. On article 29:

"It was agreed that a second option should be inserted in paragraph 1 of article 29 of the draft Registry Act to accommodate "the open-drawer approach" (in which no information would be removed from the public registry record) taken in options C and D of article 20. It was also agreed that the Guide to Enactment should explain the various options. Subject to those changes, the Committee approved the substance of article 29 of the draft Registry Act."

105. The Committee's provisional approval of parts of the draft Model Law on Secured Transactions would be reflected in subsection B 2 of the part of the Commission's report relating to agenda item 5, which would read: "At its 1023rd meeting on 16 July 2015, the Commission adopted the report of the Committee of the Whole and agreed that it should form part of the present report." That sentence would be followed by a reference in parentheses to the paragraphs of the report containing the report of the Committee of the Whole. The subsection would then continue with the words "After considering article 26 of chapter IV (on the registry system) of the draft Model Law and articles 1 to 29 of the draft Registry Act, the Commission decided to approve their substance."

106. **The Chair** took it that the Commission wished to accept the proposed text.

107. *It was so decided.*

Possible future work in the area of security interests

108. **Mr. Bazinas** (Secretariat) proposed that the following text form the section of the Commission's report relating to possible future work in the area of security interests:

"The Commission noted that, at its twenty-seventh session, Working Group VI had recommended to the Commission the preparation of a guide to enactment of the draft Model Law." A reference to the relevant paragraph(s) of the Commission's report would be included in parentheses. The report would then continue: "In that connection, the Commission noted that the Working Group, in preparing the draft Model Law, was mindful of the fact that the draft Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering the draft Model Law for enactment. In addition, the Commission noted that, in the preparation of the draft Model Law, the Working Group had assumed that the draft Model Law would be accompanied by such a guide and referred a number of matters for clarification in that guide.

"The Commission agreed that a guide to enactment of the draft Model Law should be prepared and referred that task to the Working Group. In addition, the Commission agreed that the Guide to Enactment: (a) should be as short as possible; (b) include cross references to the Secured Transactions Guide and the other texts of the Commission on secured transactions; (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision or section of the draft Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; (e) give guidance to States with respect to matters referred to them and in particular explain each option offered in various articles of the draft Model Law to assist enacting States in choosing one of the options offered. Moreover, the Commission agreed that, while the Guide to Enactment would have to be considered by the Working Group together with the draft Model Law to ensure consistency between the two texts, that consideration did not need to be as detailed as the consideration of the draft Model Law. Finally, the Commission requested the Working Group to expedite its work so as to submit the draft Model Law to the Commission for final consideration and adoption at its forty-ninth session in 2016.

> "The Commission also noted that, at its forty-third session, it had placed on its future work agenda the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing. After discussion, the Commission decided that those matters should be retained on its future work agenda and considered at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting, to be held within existing resources."

109. *It was so decided*.

110. **Mr. Sorieul** (Secretary of the Commission), recalling that, earlier in the Commission's session, a number of delegations had expressed the concern that some Working Groups sought to carry out work on specific topics indefinitely, said it was clear that the decision just adopted with regard to the mandate of Working Group VI dispelled that concern.

111. **The Chair** said that that was indeed the understanding of the Commission.

Coordination and cooperation in the area of security interests

112. **Mr. Bazinas** (Secretariat) proposed that the following text form the section of the Commission's report relating to coordination and cooperation in the area of security interests:

> "The Commission took note with appreciation of the report of the Secretariat about the progress achieved in: (a) the revision of the World Bank Insolvency and Creditor Rights Standard to take into account the key recommendations of the Secured Transactions Guide; (b) the coordination efforts with the European Commission with a view to ensuring a coordinated approach to the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade, the Secured Transactions Guide and the draft Model Law; (c) the coordination efforts with UNIDROIT with respect to a fourth protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment; and (d) the coordination efforts with the World Bank Group and the Organization of American States in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.
>
> "It was widely felt that such coordination and cooperation efforts were extremely important and should continue with a view to ensuring that the work of the Commission on security interests was reflected to the maximum extent possible in the relevant texts of other organizations. After discussion, the Commission renewed its mandate to the Secretariat to continue its coordination and cooperation efforts in the area of security interests."

113. *It was so decided*.

A/CN.9/XLVIII/CRP.1/Add.6

114. **Mr. Sorieul** (Secretary of the Commission), recalling that the Secretariat had been asked earlier in the week whether it would be possible to bring the twenty-eighth session of Working Group VI forward by a week, said that while the week of 5 October 2015 was not unavailable, the conference services had advised that parallel meetings would be held that week, as a result of which interpretation services would not be as readily available. It was not clear whether the translation services would be available, but the parallel meetings were likely to mean that the workload for translation would be high and the availability of documentation might consequently be limited. It was also important that the Secretariat have the week of 5 October to finalize the documentation for the Working Group session, since the deadline for submission of that documentation was fast approaching. He therefore suggested that the dates proposed in paragraph 3 (f) of document A/CN.9/XLVIII/CRP.1/Add.6, which he understood the Commission to have already agreed on, be retained.

115. **Mr. Labardini Flores** (Mexico) suggested that the possibility of holding the session during the week of 5 October be kept open, as that would offer delegations greater flexibility.

116. **Mr. Dennis** (United States of America) agreed that it would be helpful to leave the dates open temporarily in order to allow delegations to consult further on scheduling. It was his understanding that the dates of Working Group sessions were not always finalized during Commission sessions.

117. **Mr. Sorieul** (Secretary of the Commission) said that the possibility could not be kept open as the Secretariat had been requested by conference services to provide definite dates so that the appropriate arrangements could be made with regard to the recruitment and assignment of interpreters and translators. While the Secretariat would abide by whatever decision the Commission took, he urged delegations to agree to the scheduling proposed in document A/CN.9/XLVIII/CRP.1/Add.6 given that, although the difference of one week might seem insignificant, the pressure on Secretariat resources would be eased considerably if that scheduling were retained.

118. *Document A/CN.9/XLVIII/CRP.1/Add.6 was adopted*.

A/CN.9/XLVIII/CRP.1/Add.13

119. *Document A/CN.9/XLVIII/CRP.1/Add.13 was adopted*.

A/CN.9/XLVIII/CRP.1/Add.19

120. **Mr. Sorieul** (Secretary of the Commission), referring to paragraph 8 of the document, said that, since the Secretariat had received responses from two additional Member States indicating "5 out of 5" as their level of satisfaction with the services provided by the UNCITRAL Secretariat, the total number of States respondents having

indicated that level of satisfaction should be changed from 10 to 12 accordingly.

121. *It was so decided*.

122. *Document A/CN.9/XLVIII/CRP.1/Add.19, as orally amended, was adopted*.

A/CN.9/XLVIII/CRP.1/Add.17 (continued)

123. **Mr. Sorieul** (Secretary of the Commission) recalled that, during its earlier discussion of document A/CN.9/XLVIII/CRP.1/Add.17, the Commission had left open one issue relating to future work on micro, small and medium-sized enterprises (MSMEs). In the light of a number of suggestions as to how to reflect the Commission's discussion of that topic, and following consultation with a number of delegations, it was proposed, for the sake of completeness of the discussion, that the following two paragraphs be inserted before subparagraph (a) of paragraph 4 of that document:

> "In relation to possible future work on MSMEs as set out in table 2, paragraph 13 of document A/CN.9/841, the view was expressed that it was hoped that UNCITRAL would be able to pursue work on financial inclusion, mobile payments, access to credit and alternative dispute resolution, among other topics.
>
> "It was agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation. The Commission again confirmed the mandate granted to Working Group I."

That text would be followed by a reference, in parentheses, to the paragraphs of the report concerning that mandate.

124. **The Chair** said he took it that the Commission wished to add the proposed new paragraphs to the text of document A/CN.9/XLVIII/CRP.1/Add.17, as previously amended.

125. *It was so decided*.

126. *Document A/CN.9/XLVIII/CRP.1/Add.17, as amended, was adopted*.

Closure of the session

127. **Ms. Howard** (European Law Students' Association) expressed her appreciation to the Commission for inviting the Association to attend the session and thanked the other delegations for engaging the Association's representatives in the deliberations, which had been a valuable experience.

128. After the customary exchange of courtesies, **the Chair** declared the forty-eighth session of the Commission closed.

The meeting rose at 3.05 p.m.

II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

(A/CN.9/839)

[Original: English]

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III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Document Symbol	*Title or description*	*Location in Present Volume*
	A. List of documents before the Commission at its forty-eighth session	
	1. General series	
A/CN.9/824	Provisional agenda, annotations thereto and scheduling of meetings of the forty- eighth session	Not reproduced
A/CN.9/825	Report of Working Group I (MSMEs) on the work of its twenty-third session (Vienna, 17-21 November 2014)	Part two, chap. I, A
A/CN.9/826	Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth-first session (Vienna, 15-19 September 2014)	Part two, chap. II, A
A/CN.9/827	Report of the Working Group III (Online Dispute Resolution) on the work of its thirtieth session (Vienna, 20-24 October 2014)	Part two, chap. III, A
A/CN.9/828	Report of the Working Group IV (Electronic Commerce) on the work of its fiftieth session (Vienna, 10-14 November 2014)	Part two, chap. IV, A
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A/CN.9/831	Report of Working Group I (MSMEs) on the work of its twenty-fourth session (New York, 13-17 April 2015)	Part two, chap. I, E
A/CN.9/832	Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth-second session (New York, 2-6 February 2015	Part two, chap. II, D
A/CN.9/833	Report of the Working Group III (Online Dispute Resolution) on the work of its thirty-first session (New York, 9-13 February 2015)	Part two, chap. III, D
A/CN.9/834	Report of the Working Group IV (Electronic Commerce) on the work of its fifty-first session (New York, 18-22 May 2015)	Part two, chap. IV, C
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A/CN.9/847	Principles on Choice of Law in International Commercial Contracts	Not reproduced
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A/CN.9/853	Draft Model Law on Secured Transactions (Chapter VIII-IX)	Not reproduced
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A/CN.9/XLVIII/CRP.1 and Add.1-23	Draft report of the United Nations Commission on International Trade Law on the work of its forty-eighth session	Not reproduced
A/CN.9/XLVIII/CRP.2	Draft report on comments to be transmitted by the Commission to the General Assembly under agenda item 16	Not reproduced
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3. Information series

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B. List of documents before the Working Group on MSMEs at its twenty-third session

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A/CN.9/WG.I/WP.85	Note by the Secretariat on the best practices in business registration	Part two, chap. I, B
A/CN.9/WG.I/WP.86 and Add.1	Note by the Secretariat on micro, small and medium-sized enterprises - Legal questions surrounding the simplification of incorporation	Part two, chap. I, C
A/CN.9/WG.I/WP.87	Note by the Secretariat on Possible Alternative Legislative Models for Micro and Small Businesses - Submissions from Italy and France	Part two, chap. I, D

2. Restricted series

A/CN.9/WG.I/XXIII/CRP.1 and Add.1-4	Draft report of Working Group I (MSMEs) on the work of its twenty-third session	Not reproduced

3. Information series

A/CN.9/WG.I/XXIII/INF/1	List of participants	Not reproduced

C. List of documents before the Working Group on MSMEs at its twenty-fourth session

1. Working papers

A/CN.9/WG.I/WP.88	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.89	Note by the Secretariat on micro, small and medium-sized enterprises - Draft model law on a simplified business entity	Part two, chap. I, F
A/CN.9/WG.I/WP.90	Note by the Secretariat on observations by the Government of the Federal Republic of Germany	Part two, chap. I, G

2. Restricted series

A/CN.9/WG.I/XXIV/CRP.1 and Add. 1-4	Draft report of Working Group I (MSMEs) on the work of its twenty-fourth session	Not reproduced
A/CN.9/WG.I/XXIV/CRP.2	Draft Model Law on Secured Transactions: conceptual basis for allocation of registration-related provisions - Proposal by the National Law Centre for Inter-American Free Trade	Not reproduced

3. Information series

A/CN.9/WG.I/XXIV/INF/1	List of participants	Not reproduced

D. List of documents before the Working Group on Arbitration and Conciliation at its sixtieth-first session

1. Working papers

A/CN.9/WG.II/WP.182	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.183	Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	Part two, chap. II, B
A/CN.9/WG.II/WP.184	Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	Part two, chap. II, C

2. Restricted series

A/CN.9/WG.III/LXI/CRP.1and Add. 1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth-first session	Not reproduced

3. Information series

A/CN.9/WG.II/LXI	List of participants	Not reproduced

E. List of documents before the Working Group on Arbitration and Conciliation at its sixtieth-second session

1. Working papers

A/CN.9/WG.II/WP.185	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.186	Note by the Secretariat on settlement of commercial disputes: revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	Part two, chap. II, E
A/CN.9/WG.II/WP.187	Note by the Secretariat on settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation	Part two, chap. II, F
A/CN.9/WG.II/WP.188	Note by the Secretariat on settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation - Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings - Comments received from States	Part two, chap. II, G

2. Restricted series

A/CN.9/WG.II/LXII/CRP.1 and Add. 1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fortieth session	Not reproduced

3. Information series

A/CN.9/WG.II/LXII/INF/1/Rev.1	List of participants	Not reproduced

F. List of documents before the Working Group on Online Dispute Resolution at its thirtieth session

1. Working papers

A/CN.9/WG.III/WP.129	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.130 and Add.1	Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II)	Part two, chap. III, B

A/CN.9/WG.III/WP.131	Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)	Part two, chap. III, C

2. Restricted series

A/CN.9/WG.III/XXX/CRP.1 and Add.1-4	Draft report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session	Not reproduced
A/CN.9/WG.III/XXX/CRP.2	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules — Proposed Revisions to text of Track I and II - Proposal by the Governments of Colombia and the United States	Not reproduced
A/CN.9/WG.III/XXX/CRP.3	Chinese Delegation's Proposal for Integration of Track I and Track II of Online Dispute Resolution (ODR)	Not reproduced

3. Information series

A/CN.9/WG.III/XXX/INF/1	List of participants	Not reproduced

G. List of documents before the Working Group on Online Dispute Resolution at its thirty-first session

1. Working papers

A/CN.9/WG.III/WP.132	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.133 and Add.1	Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)	Part two, chap. III, E
A/CN.9/WG.III/WP.134	Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: Proposal by the Governments of Colombia and the United States of America	Part two, chap. III, F

2. Restricted series

A/CN.9/WG.III/XXXI/CRP.1 and Add.1-4	Draft report of Working Group III (Online dispute resolution) on the work of its thirty-first session	Not reproduced
A/CN.9/WG.III/XXXI/CRP.2	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules - Proposal by China	Not reproduced
A/CN.9/WG.III/XXXI/CRP.3	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules - Proposal by the European Union for a "two-track implementation proposal" for the "first proposal" — operation of the Annex in the United Nations system	Not reproduced
A/CN.9/WG.III/XXXI/CRP.4	Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules — Proposal by the European Union regarding the implementation of third proposal (the "second click proposal")	Not reproduced

3. Information series

A/CN.9/WG.III/XXXI/INF.1	List of participants	Not reproduced

H. List of documents before the Working Group on Electronic Commerce at its fiftieth session

1. Working papers

A/CN.9/WG.IV/WP.129	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.130 and Add.1	Note by the Secretariat on draft provisions on electronic transferable records	Part two, chap. IV, B

2. Restricted series

A/CN.9/WG.IV/L/CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its fiftieth session	Not reproduced

3. Information series

A/CN.9/WG.IV/L/INF/1	List of participants	Not reproduced

I. List of documents before the Working Group on Electronic Commerce at its fifty-first session

1. Working papers

A/CN.9/WG.IV/WP.131	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.132 and Add.1	Note by the Secretariat on draft provisions on electronic transferable records	Part two, chap. IV, D
A/CN.9/WG.IV/WP.133	Note by the Secretariat on mobile commerce/payments effected with mobile devices - Possible future work: Proposal by Colombia	Part two, chap. IV, E

2. Restricted series

A/CN.9/WG.IV/LI/CRP.1 and Add. 1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its fifty-first session	Not reproduced
A/CN.9/WG.IV/LI/CRP.2	Draft provisions on electronic transferable records- Proposal by China on Singularity of Claims	Not reproduced

3. Information series

A/CN.9/WG.IV/LI/ INF.1	List of participants	Not reproduced

G. List of documents before the Working Group on Insolvency Law at its forty-sixth session

1. Working papers

A/CN.9/WG.V/WP.123	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.124	Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups work	Part two, chap. V, B
A/CN.9/WG.V/WP.125	Note by the Secretariat on directors' obligations in the period approaching insolvency: enterprise groups	Part two, chap. V, C
A/CN.9/WG.V/WP.126	Note by the Secretariat on recognition and enforcement of foreign insolvency-derived judgements	Part two, chap. V, D

2. Restricted series

A/CN.9/WG.V/XLVI/CRP. 1 and Add. 1-4	Draft report of Working Group V (Insolvency Law) on the work of its forty-sixth session	Not reproduced

3. Information Series

A/CN.9/WG.V/XLVI/ INF.1	List of participants	Not reproduced

H. List of documents before the Working Group on Insolvency Law at its forty-seventh session

1. Working papers

A/CN.9/WG.V/WP.127	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.128	Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups	Part two, chap. V, F
A/CN.9/WG.V/WP.129	Note by the Secretariat directors' obligations in the period approaching insolvency: enterprise groups	Part two, chap. V, G
A/CN.9/WG.V/WP.130	Note by the Secretariat on cross-border recognition and enforcement of insolvency-related judgements	Part two, chap. V, H
A/CN.9/WG.V/WP.131	Note by the Secretariat on France's observations on document A/CN.9/WG.V/WP.128 entitled "Facilitating the cross-border insolvency of multinational enterprise groups"	Part two, chap. V, I

2. Restricted series

A/CN.9/WG.V/XLVI/CRP. 1 and Add. 1-3	Draft report of Working Group V (Insolvency Law) on the work of its forty-seventh session	Not reproduced

3. Information Series

A/CN.9/ WG.V/XLVII/INF/1	List of participants	Not reproduced

IV. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK*

The present list indicates the particular volume, year, part and chapter where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook;* documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission

2. Resolutions of the General Assembly

3. Reports of the Sixth Committee

4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development

5. Documents submitted to the Commission (including reports of the meetings of Working Groups)

6. Documents submitted to the Working Groups:

   (a) Working Group I:

   Time-Limits and Limitation (Prescription) (1969 to1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (as of 2004-2012); Micro, Small and Medium-sized Enterprises (as of 2014)

   (b) Working Group II:

   International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); Arbitration and Conciliation (as of 2000)

   (c) Working Group III:

   International Legislation on Shipping (1970 to 1975); Transport Law (2002 to 2008);Online Dispute Resolution (as of 2010)

   (d) Working Group IV:

   International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)

   (e) Working Group V:

   New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999); Insolvency Law (as of 2001)[*]

   (f) Working Group VI:

   Security Interests (as of 2002)[**]

7. Summary records of discussions in the Commission

8. Texts adopted by Conferences of Plenipotentiaries

9. Bibliographies of writings relating to the work of the Commission.

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[*] For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

[**] At its 35th session, the Commission adopted one-week sessions, creating six working groups.

Document symbol	*Volume, year*	*Part, chapter*
1. Reports on the annual sessions of the Commission		
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A
A/8417 (fourth session)	Volume II: 1971	Part one, II, A
A/8717 (fifth session)	Volume III: 1972	Part one, II, A
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A
A/9617 (seventh session)	Volume V: 1974	Part one, II, A
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A
A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A
A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A
A/53/17 (thirty-first session)	Volume XXIX: 1998	Part one, A
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
A/65/17 (fortieth-third session)	Volume XLI:2010	Part one, A
A/66/17 (fortieth-fourth session)	Volume XLII:2011	Part one, A
A/67/17 (fortieth-fifth session)	Volume XLIII:2012	Part one, A
A/68/17 (fortieth-sixth session)	Volume XLIV:2013	Part one, A
A/69/17 (fortieth-seventh session)	Volume XLV:2014	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

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3108 (XXVIII)	Volume V: 1974	Part one, I, C
3316 (XXIX)	Volume VI: 1975	Part one, I, C
3317 (XXIX)	Volume VI: 1975	Part three, I, B
3494 (XXX)	Volume VII: 1976	Part one, I, C
31/98	Volume VIII: 1977	Part one, I, C
31/99	Volume VIII: 1977	Part one, I, C
31/100	Volume XIII: 1977	Part one, I, C
32/145	Volume IX: 1978	Part one, I, C
32/438	Volume IX: 1978	Part one, I, C
33/92	Volume X: 1979	Part one, I, B
33/93	Volume X: 1979	Part one, I, C
34/143	Volume XI: 1980	Part one, I, C
34/150	Volume XI: 1980	Part three, III
35/166	Volume XI: 1980	Part three, III
35/51	Volume XI: 1980	Part one, II, D
35/52	Volume XI: 1980	Part one, II, D
36/32	Volume XII: 1981	Part one, D
36/107	Volume XII: 1981	Part three, I
36/111	Volume XII: 1981	Part three, II
37/103	Volume XIII: 1982	Part three, III
37/106	Volume XIII: 1982	Part one, D
37/107	Volume XIII: 1982	Part one, D
38/128	Volume XIV: 1983	Part three, III
38/134	Volume XIV: 1983	Part one, D
38/135	Volume XIV: 1983	Part one, D
39/82	Volume XV: 1984	Part one, D
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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
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49/54	Volume XXV: 1994	Part one, D
49/55	Volume XXV: 1994	Part one, D
50/47	Volume XXVI: 1995	Part one, D
51/161	Volume XXVII: 1996	Part one, D
51/162	Volume XXVII: 1996	Part one, D
52/157	Volume XXVIII: 1997	Part one, D
52/158	Volume XXVIII: 1997	Part one, D
53/103	Volume XXIX: 1998	Part one, D
54/103	Volume XXX: 1999	Part one, D
55/151	Volume XXXI: 2000	Part one, D
56/79	Volume XXXII: 2001	Part one, D
56/80	Volume XXXII: 2001	Part one, D
56/81	Volume XXXII: 2001	Part one, D
57/17	Volume XXXIII: 2002	Part one, D
57/18	Volume XXXIII: 2002	Part one, D
57/19	Volume XXXIII: 2002	Part one, D
57/20	Volume XXXIII: 2002	Part one, D
58/75	Volume XXXIV: 2003	Part one, D
58/76	Volume XXXIV: 2003	Part one, D

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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
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64/111	Volume XL: 2009	Part one, D
64/112	Volume XL: 2009	Part one, D
64/116	Volume XL: 2009	Part one, D
62/21	Volume XLI: 2010	Part one, D
62/22	Volume XLI: 2010	Part one, D
62/23	Volume XLI: 2010	Part one, D
62/24	Volume XLI: 2010	Part one, D
62/32	Volume XLI: 2010	Part one, D
66/94	Volume XLII: 2011	Part one, D
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68109	Volume XLIV: 2013	Part one, D
69/115	Volume XLV: 2014	Part one, D
69/116	Volume XLV: 2014	Part one, D
	3. Reports of the Sixth Committee	
A/5728	Volume I: 1968-1970	Part one, I, A
A/6396	Volume I: 1968-1970	Part one, II, B
A/6594	Volume I: 1968-1970	Part one, II, D
A/7408	Volume I: 1968-1970	Part two, I, B, 2
A/7747	Volume I: 1968-1970	Part two, II, B, 2
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
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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

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A/C.6/43/L.2	Volume XIX: 1988	Part three, II, A
A/43/405 and Add.1-3	Volume XIX: 1988	Part three, II, B
A/44/453 and Add.1	Volume XX: 1989	Part one, C
A/44/723	Volume XX: 1989	Part one, D
A/45/736	Volume XXI: 1990	Part one, C
A/46/688	Volume XXII: 1991	Part one, C
A/47/586	Volume XXIII: 1992	Part one, C
A/48/613	Volume XXIV: 1993	Part one, C
A/49/739	Volume XXV: 1994	Part one, C
A/50/640	Volume XXVI: 1995	Part one, C
A/51/628	Volume XXVII: 1996	Part one, C
A/52/649	Volume XXVIII: 1997	Part one, C
A/53/632	Volume XXIX: 1998	Part one, C
A/54/611	Volume XXX: 1999	Part one, C
A/55/608	Volume XXXI: 2000	Part one, C
A/56/588	Volume XXXII: 2001	Part one, C
A/57/562	Volume XXXIII 2002	Part one, C
A/58/513	Volume XXXIV: 2003	Part one, C
A/59/509	Volume XXXV: 2004	Part one, C
A/60/515	Volume XXXVI: 2005	Part one, C
A/61/453	Volume XXXVII: 2006	Part one, C
A/62/449	Volume XXXVIII: 2007	Part one, C
A/63/438	Volume XXXIX: 2008	Part one, C
A/64/447	Volume XL: 2009	Part one, C
A/65/465	Volume XLI: 2010	Part one, C
A/66/471	Volume XLII: 2011	Part one, C
A/67/465	Volume XLIII: 2012	Part one, C
A/68/462	Volume XLIV: 2013	Part one, C
A/69/496	Volume XLV: 2014	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
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TD/B/664	Volume IX: 1978	Part one, I, A
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A/34/15/Vol.II	Volume XI: 1980	Part one, I, A
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B
A/36/15/Vol.II	Volume XII: 1981	Part one, B
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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
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A/42/15	Volume XVIII: 1987	Part one, B
TD/B/1193	Volume XIX: 1988	Part one, B
TD/B/1234/Vol.II	Volume XX: 1989	Part one, B
TD/B/1277/Vol.II	Volume XXI: 1990	Part one, B
TD/B/1309/Vol.II	Volume XXII: 1991	Part one, B
TD/B/39(1)/15	Volume XXIII: 1992	Part one, B
TD/B/40(1) 14 (Vol.I)	Volume XXIV: 1993	Part one, B

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TD/B/41(1)/14 (Vol.I)	Volume XXV: 1994	Part one, B
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5. Documents submitted to the Commission, including reports of meetings of working groups

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6. Documents submitted to Working Groups

(a) Working Group I

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A/CN.9/WG.II/WP.38	Volume XIV: 1983	Part two, III, B, 2
A/CN.9/WG.II/WP.40	Volume XIV: 1983	Part two, III, D, 1
A/CN.9/WG.II/WP.41	Volume XIV: 1983	Part two, III, D, 2
A/CN.9/WG.II/WP.42	Volume XIV: 1983	Part two, III, D, 3
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A/CN.9/WG.II/WP.46	Volume XV: 1984	Part two, II, A, 2(c)
A/CN.9/WG.II/WP.48	Volume XV: 1984	Part two, II, B, 3(a)
A/CN.9/WG.II/WP.49	Volume XV: 1984	Part two, II, B, 3(b)
A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)
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A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3
A/CN.9/WG.II/WP.55	Volume XVII: 1986	Part two, III, B, 1
A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B
A/CN.9/WG.II/WP.60	Volume XIX: 1988	Part two, II, B
A/CN.9/WG.II/WP.62	Volume XX: 1989	Part two, IV, B, 1
A/CN.9/WG.II/WP.63	Volume XX: 1989	Part two, IV, B, 2
A/CN.9/WG.II/WP.65	Volume XXI: 1990	Part two, IV, B
A/CN.9/WG.II/WP.67	Volume XXII: 1991	Part two, III, B, 1
A/CN.9/WG.II/WP.68	Volume XXII: 1991	Part two, III, B, 2
A/CN.9/WG.II/WP.70	Volume XXII: 1991	Part two, III, D, 1
A/CN.9/WG.II/WP.71	Volume XXII: 1991	Part two, III, D, 2
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A/CN.9/WG.II/WP.77	Volume XXIV: 1993	Part two, II, B, 2
A/CN.9/WG.II/WP.80	Volume XXV: 1994	Part two, II, B
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A/CN.9/WG.II/WP.90	Volume XXVIII: 1997	Part two, II, D, 2
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	(iii) International Commercial Arbitration	
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A/CN.9/WG.II/WP.131	Volume XXXVI: 2005	Part two, III, B
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A/CN.9/WG.II/WP.159 and Add.1-4	Volume XLII: 2011	Part two, I, B
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A/CN.9/WG.II/WP.181	Volume XLV: 2014	Part two, I, D
	(c) Working Group III	
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A/CN.9/WG.III/WP.28	Volume XXXIV: 2003	Part two, IV, G
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A/CN.9/WG.III/WP.51	Volume XXXVII: 2006	Part two, IV, D
A/CN.9/WG.III/WP.52	Volume XXXVII: 2006	Part two, IV, E
A/CN.9/WG.III/WP.53	Volume XXXVII: 2006	Part two, IV, F
A/CN.9/WG.III/WP.54	Volume XXXVII: 2006	Part two, IV, G
A/CN.9/WG.III/WP.55	Volume XXXVII: 2006	Part two, IV, H
A/CN.9/WG.III/WP.56	Volume XXXVII: 2006	Part two, IV, I
A/CN.9/WG.III/WP.57	Volume XXXVII: 2006	Part two, IV, J
A/CN.9/WG.III/WP.58	Volume XXXVII: 2006	Part two, IV, K
A/CN.9/WG.III/WP.59	Volume XXXVII: 2006	Part two, IV, L
A/CN.9/WG.III/WP.61	Volume XXXVII: 2006	Part two, IV, N
A/CN.9/WG.III/WP.62	Volume XXXVII: 2006	Part two, IV, O
A/CN.9/WG.III/WP.63	Volume XXXVII: 2006	Part two, IV, P
A/CN.9/WG.III/WP.64	Volume XXXVII: 2006	Part two, IV, Q
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A/CN.9/WG.III/WP.73	Volume XXXVIII: 2007	Part two, IV, C
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A/CN.9/WG.III/WP.75	Volume XXXVIII: 2007	Part two, IV, E
A/CN.9/WG.III/WP.76	Volume XXXVIII: 2007	Part two, IV, F
A/CN.9/WG.III/WP.77	Volume XXXVIII: 2007	Part two, IV, G
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A/CN.9/WG.III/WP.115	Volume XLIII: 2012	Part two, IV, H
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A/CN.9/WG.III/WP.120	Volume XLIV: 2013	Part two, III, E
A/CN.9/WG.III/WP.121	Volume XLIV: 2013	Part two, III, F
A/CN.9/WG.III/WP.123 and Add.1	Volume XLV: 2014	Part two, II, B
A/CN.9/WG.III/WP.124	Volume XLV: 2014	Part two, II, C
A/CN.9/WG.III/WP.125	Volume XLV: 2014	Part two, II, D
A/CN.9/WG.III/WP.127 and Add.1	Volume XLV: 2014	Part two, II, F
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	(i) International Negotiable Instruments	
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	(ii) International Payments	
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A/CN.9/WG.IV/WP.41	Volume XXI: 1990	Part two, I, B
A/CN.9/WG.IV/WP.42	Volume XXI: 1990	Part two, I, C
A/CN.9/WG.IV/WP.44	Volume XXI: 1990	Part two, I, E
A/CN.9/WG.IV/WP.46 and Corr.1	Volume XXII: 1991	Part two, I, D, 1
A/CN.9/WG.IV/WP.47	Volume XXII: 1991	Part two, I, D, 2
A/CN.9/WG.IV/WP.49	Volume XXII: 1991	Part two, I, F
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	(iii) Electronic Commerce	
A/CN.9/WG.IV/WP.53	Volume XXIII: 1992	Part two, V, B
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A/CN.9/WG.IV/WP.57	Volume XXV: 1994	Part two, III, B, 1
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A/CN.9/WG.IV/WP.90	Volume XXXII: 2001	Part two, II, F
A/CN.9/WG.IV/WP.91	Volume XXXII: 2001	Part two, II, G
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A/CN.9/WG.IV/WP.94	Volume XXXIII: 2002	Part two, IV, B
A/CN.9/WG.IV/WP.95	Volume XXXIII: 2002	Part two, IV, C
A/CN.9/WG.IV/WP.96	Volume XXXIII: 2002	Part two, IV, D
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A/CN.9/WG.IV/WP.100	Volume XXXIV: 2003	Part two, V, E
A/CN.9/WG.IV/WP.101	Volume XXXIV: 2003	Part two, V, F
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A/CN.9/WG.IV/WP.105	Volume XXXV: 2004	Part two, IV, D
A/CN.9/WG.IV/WP.106	Volume XXXV: 2004	Part two, IV, E
A/CN.9/WG.IV/WP.108	Volume XXXV: 2004	Part two, IV, G
A/CN.9/WG.IV/WP.110	Volume XXXVI: 2005	Part two, I, B
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A/CN.9/WG.IV/WP.112	Volume XXXVI: 2005	Part two, I, D
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A/CN.9/WG.IV/WP.119	Volume XLIV: 2013	Part two, II, C
A/CN.9/WG.IV/WP.120	Volume XLIV: 2013	Part two, II, D
A/CN.9/WG.IV/WP.122	Volume XLIV: 2013	Part two, II, F
A/CN.9/WG.IV/WP.124 and Add.1	Volume XLV: 2014	Part two, IV, B
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	(e) Working Group V	
	(i) New International Economic Order	
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A/CN.9/WG.V/WP.5	Volume XII: 1981	Part two, IV, B, 2
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A/CN.9/WG.V/WP.9 and Add.1-5	Volume XIV: 1983	Part two, IV, B
A/CN.9/WG.V/WP.11 and Add.1-9	Volume XV: 1984	Part two, III, B
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A/CN.9/WG.V/WP.15 and Add.1-10	Volume XVI: 1985	Part two, III, B, 2
A/CN.9/WG.V/WP.17 and Add.1-9	Volume XVII: 1986	Part two, II, B
A/CN.9/WG.V/WP.19	Volume XVIII: 1987	Part two, II, A, 2
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